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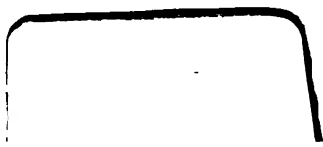
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JSN
JAH
REX

v.1



REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of Common Pleas,

WITH

TABLE OF THE NAMES OF CASES

AND

DIGEST OF THE PRINCIPAL MATTERS.

BY

WILLIAM HODGES, Esq. OF THE INNER TEMPLE,
BARRISTER AT LAW.

VOL. I.

FROM HILARY TERM FIFTH WILL. IV. 1835,

TO HILARY TERM SIXTH WILL. IV. 1836,

BOTH INCLUSIVE.

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J U D G E S
OF THE
COURT OF COMMON PLEAS,

During the Period of these Reports.

The Right Hon. Sir N. C. TINDAL, Knt., C. J.

The Hon. Sir JAMES ALLAN PARK, Knt.

The Hon. Sir STEPHEN GASELEE, Knt.

The Right Hon. Sir J. B. BOSANQUET, Knt.

The Right Hon. Sir JOHN VAUGHAN, Knt.

ATTORNEYS GENERAL.

Sir FREDERICK POLLOCK, Knt.

Sir JOHN CAMPBELL, Knt.

SOLICITORS GENERAL.

Sir WILLIAM WEBB FOLLETT, Knt.

Sir ROBERT MOUNSEY ROLFE, Knt.

MEMORANDA.

1835.—On the first day of *Hilary* Term, the following Gentlemen, having been appointed his Majesty's Counsel, were called within the bar:—William Burge, Daniel Wakefield, Henry John Shepherd, Christopher Temple, Walter Skirrow, John Miller, C. H. Barber, George Spence, Thomas Joshua Platt, Fitzroy Kelly, Richard Torin Kinderaley, Edward Jacob, and James Wigram, Esquires.

On the same day, the Honourable Sir *William Elias Taunton*, Knt., one of the Judges of the Court of *King's Bench*, died. He was succeeded by *John Taylor Coleridge*, Esquire, Serjeant at Law, who was afterwards knighted.

On the 23rd of *April*, Lord *Lyndhurst* resigned the great seal, which was put in commission. The Commissioners were, the Right Honourable Sir *Charles Christopher Pepys*, Master of the Rolls; the Right Honourable Sir *Lancelot Shadwell*, Vice Chancellor of *England*; and the Right Honourable Sir *J. B. Bosanquet*, Knt. one of the Judges of this Court.

During *Easter* Term, the Right Honourable Sir *E. B. Sugden*, Knt. resigned the office of Lord Chancellor of Ireland. He was succeeded by the Right Honourable Lord *Plunkett*. In the same Term, Sir *F. Pollock*, Knt., resigned the office of Attorney-general, and he was succeeded by Sir *John Campbell*, Knt. Sir *Wm. W. Follett*, Knt., at the same time, resigned the office of Solicitor-General, and was succeeded by *R. M. Rolfe*, Esq. one of his Majesty's Counsel, who was afterwards knighted.

In the same Term *Basil Montagu*, Esq., *Robert Alexander*, Esq., and *Thomas Starkie*, Esq., of Lincoln's Inn, having been appointed his Majesty's Counsel, were called within the bar.

1836.—In the early part of *Hilary* Term, the Lords Commissioners resigned the great seal, and the Right Honourable Sir *C. C. Pepys*, Knt., Master of the Rolls, was appointed to the office of Lord High Chancellor, and was created a Peer by the title of *Cottenham* of *Cottenham* in the county of *Cambridge*.

Henry Bickersteth, Esq., one of his Majesty's Counsel, was also appointed Master of the Rolls, and was created a Peer, by the title of Baron *Langdale* of *Langdale* in the county of *Westmorland*.

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CASES

ARGUED AND DETERMINED

IN THIS

COURT OF COMMON PLEAS,

IN

Hilary Term, 1835.

SOUTHGATE and an' Executors of Clark, v. CROWLEY
and an'

Jan. 31st.

ATCHERLEY, Serjt., had obtained a rule *nisi* calling on defendants to shew cause why the plaintiffs should not be exempted from the payment of costs to defendants under Stat. 3 & 4 Wm. 4, c. 42, sec. 31 (a), under the following circumstances. The action was brought by the plaintiffs, as executors of *Clark*, for the hire of certain waggons and carts in the lifetime of the testator. It appeared that *Clark* carried on an extensive business as a carman, and had kept a running account with the defendants for some years, but no balance had been struck. Upon the death of the testator, the executors made out a demand from his books to the amount of 917*l.*, which the defendants refused to pay, saying, that they owed no more than 535*l.*, as they had made an agreement with the testator in his lifetime, but refused to give any farther particulars of the grounds of their defence. The plaintiffs then brought this action, and the defendants paid 535*l.* into Court. At the trial, before *Tindal*, C. J., it appeared that the testator's account books contained entries of the work done from day to day, but no sums were carried out, and amongst other entries were items for the hire of a cart and two horses. At the trial a witness was called by the defendants, who proved a contract made with the testator to charge for the said cart and two horses, at the same rate as he charged for a cart and one horse; and evidence was also given that some of the other charges were two high, but there was no dispute as to the quantity of work done. The jury found a verdict for the defendants.

To entitle a plaintiff executor, to be relieved from payment of costs to a defendant who has succeeded in an action, under Stat. 3 & 4 Wm. 4, c. 42, sec. 31, it is not sufficient to prove that the action was brought *bond fide* and with a fair chance of succeeding, but some misconduct on the part of the defendant, or some other special cause for exemption, must be shewn. *Vaughan, J. dissents.*

Wilde, Serjt., now shewed cause, but was stopped by the Court, and plaintiffs' counsel were called upon to support the rule.

(a) See this section, in the judgment of *Tindal*, C. J.

Com. Pleas.
SOUTHGATE
v.
CROWLEY

Atcherley, Serjt., and *G. Hayes*, submitted that in this case the Court would exercise its power to deprive the defendants of their costs. Here the testator's books contained a *prima facie* entry of the work which had been performed, and the plaintiffs, as executors, had no knowledge of the contract which had been made by the testator in his life time. The reason why executors were not liable to pay costs under the former Statutes, is, that they were not supposed to be cognizant of their testator's affairs; it is so stated in *Hayworth v. David* (b), and *Bull v. Palmer* (c).—[*Tindal*, C. J.—I doubt if that is the true ground of their not being liable.]—If the contract had not been proved at the trial, the plaintiffs would have obtained a verdict. Here the executors owe a duty which they are bound to perform for the benefit of the estate, and are liable to a devastavit if they do not make the most of the testator's effects. Have not the executors properly performed their duty upon this occasion? They ought not to be made the insurers of the event of an action; it may be that no effects are now in their hands, and that they are liable to have these costs levied *de bonis propriis*.—[*Park*, J.—Suppose the testator had brought an action against the defendants, and failed, he must have paid costs.]—That is true, but he would be justly called upon to pay, for he had knowledge of the contract, and that is the distinction between costs paid by executors, and costs paid by other persons. No one will act as an executor if he is to be compelled to enforce a demand at his own risk. Here the plaintiffs displayed neither impatience or haste in enforcing their claim; application was made to the defendants, but they refused to pay, and gave no reason for their refusal. The defendants ought to have given the plaintiffs intimation of the terms of the contract upon which they relied. In *Wilkinson v. Edwards* (d), the plaintiff had proceeded hastily in the action. If the contract had been stated to the plaintiffs, and they had notwithstanding persisted in bringing the action, then they might be called upon to pay the costs.

TINDAL, C. J.—This motion comes before us upon the stat. 3 & 4 Wm. 4, c. 42, the 31st section of which enacts that "In every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the Court in which such action is brought shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right, upon a cause of action accruing to himself, and the defendant shall have judgment for such costs, and they shall be recovered in like manner." It appears, therefore, that the rule now is that the executor is in general liable to pay costs, and it is the excepted case that in some instances he shall not be liable, and like all other excepted cases, this must be strictly watched, or we shall not follow up and give effect to the intention of the legislature. Before this Statute, if an executor brought an action and failed, he was not liable to pay costs to the defendant; and I have always supposed that this depended upon the peculiar words in the Stats. 23 Hen. 8, c. 15, and 4 Jac. 1, c. 3, and this is no new opinion, for I find that Lord *Eldon* in *Tattersall v. Grote* (e), says,

(b) Cro. James, 329.
(c) Sir T. Jones, 47.

(d) 1 Bing. N. R. 303.
(e) 2 Bos. & P. 355.

"the sound principle on which the exemption of the executor and administrators rests, is not the degree of ignorance under which they may be supposed to lie, but that the exemption sounds itself on the description of the actions contained in the statute in which costs are to be paid." But it is unnecessary to determine this point very accurately; the only question being whether the Court will exercise their discretionary power under the circumstances of the present case. If the executors had been deceived, not simply by a want of clearness in the accounts of the testator, but by any misconduct on the part of the defendants, I am one of the first to say that in such a case the Court would relieve the executors from the payment of costs. But I cannot see any misconduct which can be imputed to the defendants in the present case. The action is brought on a claim for the annual hire of horses and carts, and a large portion of the demand is for job work performed by the testator. Now the plaintiffs must have supposed that there was some original contract entered into, between the testator and the defendants, and if they made inquiries and found that there was no contract, they must have known that they were bound to produce evidence to support a count on a *quantum meruit*. But at the trial they only produced one witness to support their charges for the work done, whilst the defendants called several persons who stated that the charges were unreasonable. I do not blame the plaintiffs for this, nor do I say that they had not a *bona fide* belief that they had a good cause of action for the whole sum claimed. The question is, was there any misconduct on the part of the defendants? It is said that there was a contract made between them and the testator, which they kept back from the knowledge of the plaintiffs. I should be sorry to say that a defendant is in all cases bound to put a plaintiff in possession of the exact grounds upon which he intends to found his defence to an action. If they had kept a receipt for a part of the sum demanded, in their pockets, and then produced it for the first time at the trial, it would have been a very different case from the present, but I know of no principle which compels a defendant to inform the plaintiff's attorney of the exact defence which he intends to set up. Under these circumstances the executors stand in the situation that other plaintiffs are in, and they must pay the defendants their costs.

PARK, J.—These are applications which are purely in the discretion of the Court, and every case must vary in its circumstances. The question is not whether the plaintiffs here acted *bona fide* in bringing their action, although I should not be disposed to say that, in this case, they have used due diligence in obtaining such information as they might have obtained. I do not think defendants are bound in every case to produce their evidence for the inspection of the plaintiff. Numerous applications are made to me at chambers for the purpose of obtaining this advantage, but I constantly refuse to allow it. I am of opinion that this rule should be discharged.

VAUGHAN, J.—I have listened with attention to the facts of this case, and as I have the misfortune to differ with the rest of the Court, it is with regret that I express any opinion. This question arises upon the construction of a Statute which makes a great change in the situation of executors who are plaintiffs in an action. I think my Lord has correctly put the grounds upon which the exception to the general rule ought to be allowed. I am now speak-

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ing from recollection, but I am sure I have read in very many cases that the reason why executors were formerly held released from the payment of costs was, that they were not supposed to be cognizant of their testators' affairs; although I am ready to admit that the privileges which they formerly enjoyed were very grossly abused; and I think that the legislature most wisely interfered to prevent such proceedings. But at the same time, it was not the intention of the Statute to compel executors to pay costs in all cases, and therefore a discretion is placed in the hands of the judges. The question then is, was it the duty of these executors, using due care and discretion, to bring this action? If it was, then they ought to be protected; and I think this was a case which was properly presented to a jury for their consideration. It is said that the defendants were not bound to disclose the contract which they had made with the testator, but it seems to me that the plaintiffs had to go into Court with them upon very unfair terms. I do not say the defendants were bound to produce the contract before the trial, but then they ought not to complain if this Court, exercising its discretion, should refuse to compel the executors to pay the costs of an action, the *prima facie* evidence to support which, was upon the face of the testator's books of account. My own opinion is, that the intention of the Statute is, that the executor shall not be called upon to pay costs, if the Court are satisfied that it was his duty to prosecute the action.

BOSANQUET, J.—Whatever may be the grounds upon which an executor was formerly exonerated from the payment of costs, I am of opinion that an executor is now placed in exactly the same situation as any other plaintiff, with regard to the payment of costs. It is not sufficient for the executor to prove that the action was brought *bona fide*, but he must also shew some special ground for exemption, for it is to be observed that by the language of the Statute he is to be generally liable, and the exemption is the excepted case. In the present case an application was made to the defendants for 917*l.* which they refused to pay, but at the same time they stated precisely the amount which they admitted to be due; and it turns out by the verdict of the jury that the defendants are right in resisting the larger claim. I do not think the defendants acted improperly in refusing to give the particulars of the contract to the plaintiffs; it appears that they said they relied on an agreement made with the testator, but refused to give the particulars of that agreement. Under these circumstances I see no reason why these, like any other defendants who have obtained a verdict, should not be entitled to receive their costs from the plaintiffs

Rule discharged.

Jan. 13*th*.

DABBS v. HUMPHREY.

Where an execution creditor appears under the Interpleader Act, and consents with the claimant that the sheriff shall sell the goods, and that their produce shall abide the event of an issue to be tried, but subsequently abandons his claim, the Court will compel him to pay the sheriff the costs of selling the goods.

THIS was an application arising from certain proceedings which had been taken under the Interpleader Act, 1 & 2 Wm. 4, c. 58, s. 6. The plaintiff *Dabbs* had issued an execution against the goods of defendant, and on the 25th of Feb., the sheriff of Surrey seized some stock in trade, believing it to be the property of the defendant. Two persons, named *Firminger* and *Aylmore*, gave the sheriff notice that the goods seized were their property, and

the sheriff on the 3d of *May* applied to the Court for protection under sec. 6 of Stat. 1 & 2 *Wm.* 4, c. 58, and by the order of the judge to whom the application was made, two issues were directed to be tried, wherein *Dabbs* should be plaintiff, and *Firminger* and *Aylmore* defendants, and by consent of all parties, it was agreed that the sheriff should sell the goods, and pay the proceeds into Court to await the trial of the issues. On the 23d of *May* following, the sheriff sold the goods for the sum of 138*l.* 8*s.* The plaintiff finding on inquiry that he could not sustain his right to take the goods under the execution, abandoned his claim to the proceeds of the sale, and the sheriff being called upon by summons, before a judge, to pay over the proceeds of the sale, he claimed the costs of keeping possession of the goods, and also the costs of the sale. The learned judge ordered the sheriff to pay 127*l.* to *Firminger* and *Aylmore*, and to pay the remaining 11*l.* 8*s.* into Court (which was the amount of the costs of the sale incurred by the sheriff), reserving leave to the sheriff to apply to the Court for the costs of the sale, and of keeping the possession. *W. Clarkson* having obtained a rule nisi accordingly during the last Term.

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Bompas, Serjt., now shewed cause on behalf of the claimants.—It is submitted, that as the property of the claimants has been improperly taken by the sheriff, they are entitled to receive its full value. The 11*l.* 8*s.* now in Court, clearly belongs to the parties whose goods were sold. If the Interpleader Act had not enabled the sheriff to come to the Court for protection, he would have been liable to an action of trover, and then the claimants would have recovered the full value of the goods. As against these parties the acts of the sheriff were all wrongful.

Barstow, for the execution creditor.—It does not appear that the execution creditor insisted that the sheriff should take these goods in execution; he merely delivered the writ to the sheriff, and then the sheriff took the goods of another person in execution. It has been decided that the sheriff is not in general entitled to costs, *Bishop v. Hinxman* (a).

W. Clarkson, for the sheriff.—The execution creditor was aware of the claim set up to the goods, and that the sheriff intended to apply to the court for relief. The sheriff does not make any claim to poundage, but he is clearly entitled to the cost of the sale and of keeping possession, for after the agreement which was come to, that the goods should be sold, he was the agent of the execution creditor.—[*Tindal*, C. J.—It is clear he was acting as agent from the 3d of *May*, until the sale of the goods, but can it be said that he was an agent before that time?—Perhaps it cannot be contended that he was. It may be admitted, that in general, the sheriff is not entitled to his costs; but that rule is not without exceptions. In *Bryant v. Ikey* (b), the Court allowed the sheriff his costs against the execution creditor.

TINDAL, C. J.—I am of opinion that the justice of this case will be answered by making this rule absolute, so far as it relates to the costs of selling the goods, and of keeping possession from the 3d of *May* until the day of sale, and to the costs of this application; and I think that these costs ought to come out of the pocket of the execution creditor. It appears that

(a) 2 Dow. P. C. 166.

(b) 1 Dow. P. C. 428.

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the goods of the claimants were improperly seized by the sheriff, but every step, which was subsequently taken, was for the benefit of the wrong doer. It may be asked, why the execution creditor is to suffer for the act of the sheriff? for it was the hand of the sheriff which took the goods not included in his writ; but when we weigh the transaction as between the sheriff and the execution creditor who sued out the writ, I cannot say that the sheriff was a wrong doer. After the 3d of May, the sheriff became an agent, and he is entitled to look to the execution creditor for the expenses incurred in turning the goods into money, and also for keeping possession of them from that time until the time of sale; and also to the costs of this application, for the sheriff was compelled to come here to obtain payment of his costs. The costs incurred by the claimants, in appearing upon the present application, must also be paid by the execution creditor.

Rule absolute.

Jan. 13th.

DOE dem. PUGH v. ROE.

Where proceedings are taken under Stat. 4 Geo. 2, c. 28, affixing the declaration in ejectment, upon the door of the demised premises, will not be allowed as good service, if there is any probability that the tenant can be personally served.

WATSON moved for judgment against the casual ejector in an action of ejectment, where proceedings had been taken under the Stat. 4 Geo. 2, c. 28. By sec. 2, the landlord is directed to serve a declaration in ejectment, "or in case the same *cannot be legally served*, or no tenant be in actual possession of the premises, then to affix the same on the door of any demised messuage." Here it appeared by the affidavit that every possible attempt had been made to serve the tenant personally without effect. On the 9th of *January*, the deponent called at the tenant's house and saw his servant, who said he was not at home; he then said he would call again in an hour, and he did call accordingly, but he was still from home. A copy of the declaration was then left with the servant. The deponent called twice on the following day, but could not see the tenant, and he then affixed a copy of the declaration on the street door. On a subsequent day the servant, who was seen upon the first visit, admitted that she had given the declaration to her master. The affidavit also contained the deponent's belief, that the tenant kept out of the way to avoid due service of the declaration.

TINDAL, C. J.—You do not shew enough to entitle you to your rule; after a little more watching you will probably find the tenant.

Watson then asked for a rule nisi.

TINDAL, C. J.—We cannot force the tenant's conscience, by calling upon him to answer your affidavit.

Rule refused.

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HART v. BELL.

A defendant may, notwithstanding the new rules of pleading, plead the general issue, and another plea apparently inconsistent, if he has reasonable grounds for supposing both are necessary to meet the exigencies of the case.

BUTT applied for leave to plead several matters in an action of debt on simple contract. It is proposed to plead, 1st. As to 12*l.*; the bankruptcy of defendant. 2d. As to 23*l.*; payment. 3d. As to 1*l.* 2*s.* 6*d.*; accord and satisfaction. 4th. As to the whole demand except 24*l.* 2*s.* 6*d.*; the general issue, *nil debet*.—[*Gaselee, J.*—This matter has been before me at chambers, and I thought the 4th plea ought to apply to the whole demand except 36*l.* 2*s.* 6*d.* instead of 24*l.* 2*s.* 6*d.*, the former sum being admitted to be due, by the

three first pleas.]—There is nothing in the new rules on pleading (a) to prevent a defendant from pleading the general issue with any other plea apparently inconsistent.—[*Tindal*, C. J.—Not if you shew any reasonable ground for using both.]—In the present case it is supposed that the plaintiff intends to set up a promise to pay made by the defendant, since he became a bankrupt, and it is therefore very material that the defendant should be allowed to plead the general issue, as to that part of the demand, in addition to the first plea.

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GASELEE, J.—This was not explained to me at chambers.

TINDAL, C. J.—Under these circumstances your application may be granted.
Application granted (b).

(a) R. H. T. (*Pleading*), 4 W. 4, No. 5. (b) See also *Leuchart v. Cooper*, post, 16.

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Jan. 23d.

DEMURRER to replication. The declaration stated that, before the making of the agreement thereafter mentioned, certain persons, to wit, *George P. Manley* and *Mary Manley*, did, by a certain indenture of mortgage, dated, &c. assign to the plaintiff certain messuages and premises for the residue of a term of ninety-nine years, subject to a proviso for the redemption of the same premises on the payment of 8000*l.* on the 10th day of *January*, 1834, with interest for the same at the rate of 5 per cent. per annum, such interest to be paid in even portions half-yearly. And the said *G. P. Manley* and *M. Manley* did thereby jointly and severally covenant, that they, or one of them, would, after the 10th day of *January*, 1830, pay unto certain trustees, during such time as the said sum of 8000*l.*, or any part thereof should remain unpaid, such annual sum of money as should be after the rate of 5 per cent. per annum on the same sum of 8000*l.*, or on so much thereof as should from time to time remain unpaid, by even portions half-yearly, at the respective times appointed by the aforesaid proviso for payment of interest, to be held upon certain trusts therein expressed for forming a sinking fund, to be applied towards the liquidation of the principal sum of 8000*l.* The declaration then stated that, for the further securing the said 8000*l.*, the said *G. P. Manley* and *M. Manley* executed in favour of the said plaintiff a certain warrant of attorney, bearing date the day and year first aforesaid; and thereby authorized certain attorneys therein mentioned, jointly and severally to appear for the said *G. P. Manley* and *M. Manley* as of that term or the term then next, or any other subsequent term, and then and there to receive a declaration for them in an action of debt against them for the sum of 16,000*l.* at the suit of the said plaintiff, and thereupon to confess the same action; and also to suffer judgment by *nil dicit* or otherwise to pass against them in the said action, and to be forthwith entered up against them of record for the said sum of 16,000*l.*, together with costs of suit, which said warrant of attorney was and is subject to a certain defeasance thereunder written; which said defeasance, after reciting the above-mentioned mortgage,

1. Where a warrant of attorney is given for the payment of a sum of money by instalments, with a power reserved to the plaintiff to issue executions from time to time as the payments become due. *Seem* that the body of a defendant may be taken in execution a second time, although he has been discharged under a previous execution.

2. Where a party is in execution, and a third person engages that if he is discharged, he will have him forthcoming at any future period, in case it should appear necessary to the plaintiff to issue another execution, and an action is afterwards brought for the non-performance of such an agreement, the defendant cannot set up the illegality of the

first execution as an answer to the action.

3. In such an action, if the plaintiff avers generally that the defendant had notice of the issuing of the second execution, the defendant cannot object on *general demurrer*, that the time and place when and where he was required to render the party, is not set out in the declaration.

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and after reciting that the said *G. P. Manley* and *M. Manley* entered into the above-mentioned warrant of attorney as a further and additional security for the repayment of the said sum of 8000*l.*, with interest, after the rate and at the respective times, and in manner appointed for payment thereof respectively by the above-mentioned indenture of mortgage, and that it was intended that judgment should be forthwith entered up against them by virtue of the said warrant of attorney, is as follows:—that no execution should be issued upon the said judgment, so to be entered up by virtue of the above-mentioned warrant of attorney, until default should be made in payment of the said sum of 8000*l.*, or the interest thereof, or the annual sum so covenanted to be paid to the said trustees, as in the said indenture of mortgage mentioned, and at the respective times therein mentioned, and in manner therein appointed for payment thereof respectively; *but in case default should be made in any such payment as aforesaid, that it should be lawful for the said plaintiff, his executors, administrators, or assigns, at any time, or from time to time thereafter to issue execution, or cause execution to be issued upon the said judgment for the whole, or any part or parts of the said sum of 8000*l.* and the interest thereof; and all costs, charges, and expenses occasioned by the non-payment thereof, without the necessity of reviving the said judgment, notwithstanding there should have been no prior proceedings thereon, or no proceeding within one year immediately preceding the issuing of such execution.* And whereas, before the making of the memorandum of agreement, and the said promise of the said defendant hereinafter mentioned in *Hilary Term*, &c. the said plaintiff caused judgment to be entered up upon the said warrant of attorney in the Court of *King's Bench* at *Westminster*, against the said *G. P. Manley* and *M. Manley* for the said sum of 16,000*l.*, together with his costs of suit, amounting to the further sum of 3*l.* 5*s.*; and afterwards and before the making of the memorandum of agreement, and the said promise of the said defendant hereinafter mentioned, the said *G. P. Manley* and *M. Manley* made default in the payment of the said annual sums of money so covenanted to be paid by them to the said trustees as aforesaid, at the times and after the rate aforesaid; and thereupon the said plaintiff, for having execution upon the said judgment against the said *G. P. Manley* and *M. Manley* for a certain sum of money, to wit, the sum of 802*l.*, 2*s.* afterwards and before the making of the memorandum of agreement, and the said promise of the said defendant, hereinafter mentioned, sued and prosecuted out of the said court a certain writ of our said lord the king, called a *testatum capias ad satisfaciendum*, founded on the said judgment so entered up, under and by virtue of the said warrant of attorney as aforesaid, against the said *G. P. Manley* and *M. Manley*, directed to the sheriff of the city of *Bristol*, by virtue of which said writ the sheriff of the city of *Bristol* took and arrested the said *G. P. Manley* and *M. Manley*, and kept and detained them in custody until and at and after the time of the making of the memorandum of agreement and the said promise of the said defendant hereinafter mentioned, of all which, &c. the said defendant afterwards, and before the making of the memorandum of agreement and the said promise of the said defendant hereinafter mentioned, had notice, and thereupon, in consideration of the premises heretofore, to wit, on, &c. by a certain memorandum of agreement in writing then made between the said plaintiff and the said defendant, and then signed by the said defendant,

it was agreed by and between the said plaintiff and the said defendant, that upon payment to the under-sheriff of the expenses of the execution under which they the said *G. P. Manley* and *M. Manley* were then in custody, they the said *G. P. Manley* and *M. Manley* should be discharged, the defendant then engaging that they should be forthcoming at any future period within twelve months, in case it should appear to the said plaintiff to be necessary to issue another execution against the said *G. P. Manley* and *M. Manley*, and that the said defendant pledged himself on the part of the said *G. P. Manley* and *M. Manley*, that they should without delay execute a deed of trust for sale, and that steps should be taken as soon as conveniently might be to effect a sale of the mortgaged property; and the defendant also agreed that the said *G. P. Manley* and *M. Manley* should pay or be charged with all proper costs and charges incurred by the sheriff of *Devonshire* and the plaintiff, relative to the execution issued against them in the month of *March* then last; and the said agreement being so made as aforesaid, to wit, &c. in consideration thereof, and that the said plaintiff, at the special instance and request of the said defendant, had then promised the said defendant to perform and fulfil the said agreement in all things on the said plaintiff's part and behalf to be performed and fulfilled, he the said defendant promised the said plaintiff to perform and fulfil the said agreement in all things on the said defendant's part and behalf to be performed and fulfilled, and the said plaintiff in fact says, that although after the making of the said agreement, to wit, &c. he, confiding in the said promise of the said defendant, and in hopes of his faithful performance thereof, did suffer and permit the said *G. P. Manley* and the said *M. Manley* to be discharged out of the custody of the said sheriff, and the said *G. P. Manley* and *M. Manley* were then discharged out of the said custody accordingly; and although it afterwards, and before the commencement of this suit, and within the space of twelve months from the time of the making of the said memorandum of agreement and the said promise of the said defendant, appeared to the said plaintiff to be necessary to issue another execution against the said *G. P. Manley* and *M. Manley*, and although the said plaintiff did within such time as aforesaid, and after the 10th day of *January*, 1834, and before the commencement of this suit, issue another execution against the said *G. P. Manley* and *M. Manley*, upon the said judgment so entered up as aforesaid, for a large sum of money, to wit, the sum of 7215*l.* 9*s.* 1*d.* then remaining due from the said *G. P. Manley* and *M. Manley* to the said plaintiff, upon the said indenture of mortgage, *whereof the said defendant afterwards, and before the commencement of this suit, to wit, &c. had notice*, nevertheless the said defendant, not regarding the said memorandum of agreement or his said promise, did not at any time after the said last-mentioned execution against the said *G. P. Manley* and *M. Manley* was issued, cause or procure the said *G. P. Manley* and *M. Manley*, or either of them, to be forthcoming, but hath hitherto wholly neglected and refused so to do, and by reason thereof the said plaintiff hath been hindered and prevented from enforcing his said last-mentioned execution against the said *G. P. Manley* and *M. Manley*, or either of them, and is likely to lose the said sum of money so remaining due to him from the said *G. P. Manley* and *M. Manley* as last aforesaid, upon the said indenture of mortgage, and all means of enforcing payment of the same, to the damage of the said plaintiff of 10,000*l.* and therefore he brings his suit, &c.

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Plea. The said defendant says, that at the time of the suing and prosecuting of the said writ of *testatum capias ad satisfaciendum*, and also at the time of the taking and arresting of the said *G. P. Manley* and *M. Manley*, by virtue of the same writ, and also at the time of the making of the said supposed agreement and promise, as in the said declaration is mentioned, the said sum of 8,000*l.* was not, nor was any part thereof, nor was any interest upon the same or upon any part thereof, due or payable from the said *G. P. Manley* and *M. Manley* to the plaintiff, nor had any costs, charges, or expenses been occasioned by the nonpayment thereof, wherefore the defendant prays judgment.

Replication. The said plaintiff, as to the said plea of the said defendant, by him above pleaded, saith, that at the time of the suing and prosecuting the said writ of *testatum capias ad satisfaciendum*, and also at the time of the taking and arresting of the said *G. P. Manley* and *M. Manley* by virtue of the same writ, and also at the time of making the said agreement and promise, as in the said declaration is mentioned, a certain sum of money, to wit, the sum of 800*l.* of lawful money of *Great Britain*, for interest upon the said sum of 8,000*l.*, and also in respect of the said annual payments so by the said indenture covenanted to be made as in the said declaration is mentioned, was due and payable from the said *G. P. Manley* and *M. Manley* to the said plaintiff, and this he the said plaintiff prays may be inquired of by the country, &c. Demurrer and joinder.

J. Manning, for the defendant, in support of the demurrer.—The replication and declaration are both bad. The first objection to the declaration is, that the discharge of the *Manleys*, by the consent of the plaintiff, after they were taken in execution, discharged the judgment absolutely, and they were not liable to be taken a second time. *Blackburn v. Stupart* (a), is one of the latest authorities; there *Gross, J.* considered this point as settled, and said "that it would be very dangerous to permit the law to be unsettled in this respect, which is, that a person cannot be taken in execution twice on the same judgment whether he had so agreed or not." *Vigers v. Aldrich* (b), is also to the same effect, and that case is recognised in *Jaques v. Witty* (c). These cases are followed by *Clark v. Clement* (d), and *Tanner v. Hague* (e); the latter case is quite in point, there it was held that if a plaintiff consents that the defendant shall be discharged out of execution on his undertaking to pay at a future day, the plaintiff cannot afterwards sue out any execution on that judgment if the defendant does not fulfil his undertaking. *Ballam v. Price* (f), decides that where two defendants were taken in execution, and one was discharged out of custody on giving a promissory note, payable by instalments for the debt and costs, that the other was discharged also. In *Walker v. Alder* (g), the principle acknowledged in the modern cases is established.—[*Tindal, C. J.*—*Da Costa v. Davis* (h) seems the strongest case in your favour.]—It is very similar to this case. There the defendant gave a bond to procure the release of one *Edward May*, who was in execution, and one of the conditions was that *May* should be surrendered at a

(a) 3 East, 343.
 (b) 4 Burr. 2483.
 (c) 1 T. R. 557.
 (d) 6 T. R. 524.

(e) 7 T. R. 420.
 (f) 2 B. Moore, 235.
 (g) Style, 117.
 (h) 1 Bos. & Pul. 242.

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future day, so that he might be again taken in execution, and the Court held that this part of the condition was void. It is submitted that the words used in the defeazance, which enabled the plaintiff to issue execution "from time to time" against the *Manleys*, cannot supersede the rule which is so well established, that the body of the defendant, being once in execution, the judgment is satisfied.—[*Tindal*, C. J.—By the Statute of Wm. (i), defendants may be taken in execution a second time, for further breaches, upon the original judgment.]—That is by the express stipulations of the Statute, and it was passed for the ease of defendants. In all cases where a second execution has been permitted for the recovery of the same debt, the proceedings have been by writ of *fiery facias*, and not by *capias ad satisfaciendum*. Secondly, Although it is alleged in the declaration that the defendant had notice of the second execution having been issued against the *Manleys*, it is not stated that he had notice of the place and time where and when he was required to render them.—[*Tindal*, C. J.—There is an averment of notice generally, and we must assume it was a good notice. You could only take advantage of this objection on special demurrer.]—Thirdly, Admitting the declaration to be good, the replication does not answer the plea.—[*Tindal*, C. J.—You have taken issue in your plea upon the validity of the execution issued by the plaintiff against the *Manleys*, but supposing the defendant's undertaking not to be an illegal undertaking, it is no answer to say that the execution against the *Manleys* was not sustainable.]

Wilde, Serjt., for the plaintiff.—The defendant's plea is bad. The rule which has been stated, that a defendant cannot be taken a second time in execution, is laid down too broadly; and although the cases have been too long established to be overruled in this Court, they might be successfully questioned in a Court of Error. But the ingredient to bring the present case within that rule is wanting. In *Vigers v. Aldrich* (j), the defendant, when discharged from the first execution, did not consent that he should be taken again upon the same judgment, but he gave a new security to the plaintiff. *Jaques v. Withy* (k) is constantly cited as an authority for the position, that a defendant once discharged when taken in execution, is discharged altogether; but there also a new security was accepted by the plaintiff, and that proved to be void by the non-observance of the provisions of an Annuity Act. The party could have had no right in that case to take the defendant again upon the original judgment, for he had accepted a new security. Nor was there any limitation of time within which the defendant was liable to be again taken in execution, as in this case. The strongest case against the plaintiff is *Blackburn v. Stupart* (l), and there Mr. Justice *Grose* expressed himself very strongly; but admitting that his opinion could be supported to its fullest extent, the present case is not affected by it. In all the decisions which have been mentioned, the party in custody was in execution for the whole debt. The object of the executions was to obtain payment of the whole debt. But nothing is more common than for a judgment to be given as a security, with the sum payable by instalments; and in such a case the plaintiff may sever in his executions. The Statute 8

(i) 8 & 9 Wm. 3, c. 11.

(j) 4 Barr. 2483.

(k) 1 T. R. 557.

(l) 2 East, 243.

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& 9 *Wm.* 3, c. 11, recognises the validity of such an agreement, and it has never been discussed, because it has never been questioned. In such cases the plaintiffs have always issued successive executions for the instalments as they became due, against the body or the goods of the defendants. In *Austerbury v. Morgan (m)*, *Cox v. Rodbard (n)*, *Tilby v. Best (o)*, *Leveridge v. Forty (p)*, the power so to secure a debt, by instalments which can from time to time be recovered by execution, is fully recognised. Here the plaintiff is empowered to issue executions "from time to time thereafter, for the whole or any part or parts of the said sum of 8000*l.* and the interest thereof." The first default was in making the annual payments, and only 802*l.* 2*s.* was then sought to be recovered. The *Manleys* were never sought to be charged in execution twice, for the same sum of money, and it does not appear that the 802*l.* 2*s.* was even included in the amount for which the second execution issued. But if the second execution did include the 802*l.* 2*s.*, the proper amount for which the execution should have issued, is not in question to-day. The defendant was bound to produce the *Manleys* according to his undertaking, and then the amount of damages to which the plaintiff was entitled, would have been discussed. There are two cases which may be mentioned with reference to one part of the argument on the other side, *viz.* that the agreement entered into by the defendant was founded on an illegal consideration. In *Longridge v. Dorvill (q)*, it was held that the giving up of a suit instituted to try a question respecting which the law was doubtful, is a good consideration to support a promise to pay a stipulated sum; and in *Stracy v. Bank of England (r)*, where it was a question of great nicety and difficulty whether the Bank was by law liable to make good a loss by forgery: the engagement of the Bank, to replace some stock without litigation, was held a good consideration to support a promise made by the defendants. With regard to the case of *Da Costa v. Davis (s)*, it may be observed that no argument was then raised upon the validity of the bond, and the judgment of the Court is not so fully given as to shew what the real grounds of the decision were.

Manning, in reply.—*Foster v. Jackson (t)*, is a case where the law respecting the effect of taking a defendant in execution is well considered; there it is said "if a *capias* be executed, that is in law sufficient for the whole debt, for *corpus humanum non recipit estimationem*." The principle is that the taking of the body is the highest satisfaction known to the law, and from that time the judgment is satisfied; and this was also an acknowledged principle of the civil law. The cases relating to the sufficiency of the consideration to support a promise are not in point. The agreement entered into by the defendant, that he would again render the *Manleys* in execution, was to do an act illegal and void, from which the plaintiff could have derived no benefit. It is contended on the other side, that there are cases where executions against the body of a defendant are allowed from time to time, but no case has been cited where a writ of *capias* has been issued more than once. Subsequent proceedings may be taken by executions against the goods of the

(m) 2 Taunt. 195.
 (n) 3 Taunt. 74.
 (o) 16 East. 163.
 (p) 1 M. & S. 706.

(q) 5 B. & A. 117.
 (r) 6 Bing. 772.
 (s) 1 Bos. & P. 242.
 (t) Hobart, 60.

defendant. Before the Statute 21 Jac. 1 (u), if a debtor died in execution, the creditor was for ever barred and concluded from taking out execution against the lands or goods of the deceased. And by the statute 41 Geo. 3 (v), which was in force for three years only, creditors were empowered to discharge their debtors who had been taken in execution, and issue subsequent executions against their goods and effects, which they could not do at common law. These Statutes recognise the position, that when the body of the debtor is once taken, the plaintiff has no further remedy, because he has chosen a remedy of the highest description known to the law.

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TINDAL, C. J.—This question arises on demurrer to the plaintiff's replication; but it seems to me, that the defendant's plea is bad in law. The declaration states that it was agreed between the plaintiff and the defendant that the *Manleys* should be discharged out of the custody of the sheriff, the defendant then engaging that they should be forthcoming at any future period within twelve months, in case it should appear necessary to the plaintiff to issue another execution against them. In answer to this it is suggested, that at the time when the original execution issued there was nothing due to the plaintiff; but it appears to me, that the agreement admits that they were legally in execution, and the validity of that proceeding cannot be disputed, for the defendant has obtained for his friends all the benefit which could be derived from the agreement, and he is estopped from setting up the invalidity of the writ, or the want of consideration to support the agreement. But then it is said, although the plea may be insufficient, the declaration is bad, and it is alleged that the contract entered into between the plaintiff and the defendant is bad in law; but it appears to me, looking at the statement in the declaration, and hearing the arguments at the bar, that such is not the case. The state of the case is as follows.—[Here his Lordship stated the facts relating to the giving the mortgage and warrant of attorney as they appear in the pleadings.]—The declaration then goes on to say, that it became necessary to issue execution for the sum of 802*l.* 2*s.*; not an execution, it is to be observed, for the whole sum of 16,000*l.*, but for a portion of it. The *Manleys* are taken in execution, and the defendant then comes forward and says to the plaintiff, "if you will discharge them out of custody, I will undertake that they shall be forthcoming at any future period, in case it should be necessary to issue another execution against them." The declaration proceeds to state, that it did become necessary to issue another execution against the *Manleys*, for 7,215*l.* 9*s.*, but that the defendant made default in performing his undertaking, and that the *Manleys* were not forthcoming, whereby the plaintiff had been prevented from enforcing his execution. Now, upon this state of facts it is said, that the declaration shews an agreement made by the defendant which is void in law;—that the plaintiff having once had his debtor in execution, he cannot again take his body to satisfy the judgment. But admitting, for the sake of argument, that this would be so when the second execution issues for the same debt, there is no allegation in the present case, that the party was charged in execution for the same sum of money, and, indeed, from calculation it would appear that it was a different sum entirely, which was the subject matter of the second

(u) 21 Jac. 1, c. 24, s. 2.

(v) 41 Geo. 3, c. 64.

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execution. But this fact does not plainly appear upon the pleadings, but if the defendant relied upon it, he ought not to have left it a matter of doubt, for he might have set the fact out in his plea, and in the absence of any such allegation, we are not to urge this objection against the plaintiff. But if we take it that it did appear that execution was issued against the bodies of the *Manleys* a second time for the same sum of money, the defendant has not given an answer to the cases which have been cited for the purpose of shewing that an agreement that successive executions should be issued, is legal. *Tilby v. Best* (w); *Leveridge v. Forty* (x); *Austerbury v. Morgan* (y); *Cox v. Redford* (z); all recognise such agreements, and no case has been cited on the other side to throw a doubt upon them. It is to be remarked, that if a contrary doctrine prevailed, the sheriff would have been a trespasser, if he had, in any of those cases, enforced a second execution. The whole question is one of damages, and judgment must be for the plaintiff.

PARK, J.—In *Jaques v. Withy* (a), Mr. Justice Ashurst laid down the rule generally, that he knew only of one case where a debtor in execution, who obtains his liberty, could afterwards be taken again for the same debt, and that is where he has escaped. But Mr. Justice Buller, in the same case, seems to have assigned as a reason for his decision, that the original debt had been extinguished and a new security given, and that therefore, when the new security was discovered to be void, the plaintiff could not revive his original judgment. There is a case of *Baker v. Ridgway* (b), in which the Court was unanimously of opinion, that where a party has been taken in execution and discharged through his own fraud, that he might be taken again; and although I differed from the rest of the Court upon that occasion, it was on the ground that the fraud had not been proved to my satisfaction. But I consider the present case upon this ground, viz. that the defendant ought to have made it quite apparent, that it was the same debt which was the subject matter of the second execution which was issued. There was nothing illegal in the agreement entered into by the defendant, and it was his duty to render the *Manleys* in execution. He has failed to do so, and the plaintiff is entitled to our judgment.

VAUGHAN, J.—I am of the same opinion. It is not necessary to discuss, much less to disturb, any of those authorities which apply to cases where the party is taken twice in execution for the same debt. If a party agrees that successive executions shall issue, it is for his own ease and convenience. Upon looking at this record, the strongest inference arises that the second execution did not issue for the recovery of the same debt as was sought to be recovered under the first execution.

BOSANQUET, J.—I am of opinion that judgment ought to be given for the plaintiff. The main question arises upon the declaration, and on the liability of the *Manleys* to be taken under the second execution. It is not necessary to enter into a consideration of the case of *Da Costa v. Davis* (c), for here

(w) 16 East, 163.
 (x) 1 M. & S. 708.
 (y) 2 Taunt. 195.
 (z) 3 Taunt. 74.

(a) 1 T. R. 557
 (b) 2 Bing. 48; S. C. 9 B. Moore, 114.
 (c) 1 Bos. & Pul. 242.

the *Manleys* were liable to be taken in execution the second time, and the ground of my opinion is, that it does not appear that the second execution issued for the same, or for any part of the same debt, as that for the recovery of which they were originally taken in execution. It is perfectly consistent with the facts that it was a different sum, and if it was not, it was incumbent upon the defendant to shew the fact upon the record.

Judgment for the Plaintiff.

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DE BASTOS v. WILLMOTT.

Jan. 27th.

TALFOURD, Serjt., moved that the secondary should enter satisfaction on a judgment roll, under the following circumstances. The plaintiff obtained judgment against the defendant in *November*, 1826, which was soon afterwards satisfied; but the plaintiff is now out of the country, and consequently the usual warrant, authorizing an attorney to enter up satisfaction on the judgment roll, cannot be obtained from him. That the judgment has, however, been satisfied, appears by an affidavit made by the sheriff's officer, who levied the amount from the defendant, and who states that he paid the same to Messrs. *Eccles and Co.* of *Manchester*, the plaintiff's solicitors, and that he believes the judgment is satisfied. The defendant is now desirous of making a title to some property, and consequently the present application is made.

Where a judgment has been satisfied, and the plaintiff is out of the country, so that the usual warrant to enter up satisfaction on the Roll cannot be obtained, the defendant must clearly prove that the judgment is satisfied before satisfaction can be entered.

TINDAL, C. J.—It must be shewn to the Court, by what authority the writ issued under which the officer levied. You must obtain this information, and get an affidavit from Messrs. *Eccles and Co.*

Rule refused.

See *Speech v. Stads*, 8 Moore, 461; *Tidd's Prac.* 1041; 9th edit.

TUCKER v. TUCKER.

Jan. 29th.

WILDE, Serjt., moved for a rule to shew cause, why the defendant should not be discharged out of custody on entering a common appearance. By the affidavit it appeared that the plaintiff, who was sister to the defendant, had arrested him for a debt of 72*l.*, and the affidavit of debt stated the money to be due for the board, maintenance, and education of the defendant's children, from 1818 to 1823. The defendant deposes, that during the said years he was residing abroad, and that he had annually paid the plaintiff the amount of her bills for educating his children. That in 1828, after his return to England, he paid the plaintiff 24*l.* as the balance of her account, and her receipt is now produced; and he also deposes, that she had been in the habit of borrowing small sums of money from his wife, who was since dead. It may be admitted, that it is only where the circumstances of a case are peculiar, that such an application as the present is granted; but authorities are not wanting to shew, that the Court will interfere in a summary manner. *Nizetich v. Bonacich* (a), *M'Ginnis v. M'Curling* (b), *Burton v. Haworth* (c). Here the debt is *primâ facie* barred by the Statute of Limitations, upon the face of

Where the affidavit to hold to bail discloses that the debt is *primâ facie* barred by the Statute of Limitations, and where other peculiar facts are stated on affidavit, to shew that the plaintiff has no cause of action, the Court will grant a rule nisi, calling upon the plaintiff to shew cause why the defendant should not be discharged out of custody on entering a common appearance.

(a) 5 B. & A. 904.
(b) 6 D. & R. 24.

(c) 1 Nev. & M. 318.

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the plaintiff's affidavit of debt.—[*Park, J.*—In *Masel v. Angel* (d), a similar application was made.]

TINDAL, C. J.—The Court cannot be too strict in holding the rule that they will not prejudice a case upon affidavits made on one side only, but there is something very peculiar in this case, and we grant a rule to shew cause, in order to bring the parties before the Court, that the matter may be speedily decided.

Rule granted.

[Upon a subsequent day, cause was shewn to the above rule, but the matter was ultimately referred to the prothonotary.]

(d) 6 D. & R. 19

Jas. 30th.

LEUCKART v. COOPER and an'

In an action of trover for wool, a defendant may plead since Reg. 5, H. T. 4 W. 4, 1st. The general issue; 2d. A lien by custom; 3d. A lien by agreement; 4th. A lien by custom, with a statement that the wool was deposited by one having a *prima facie* title to it; and 5th. A lien by custom, with a statement that the wool was deposited with the defendant by the plaintiff's agent.

TROVER for wool. The defendants pleaded, *First*. The general issue, *not guilty*.

Second Plea, That defendants were public uptown warehouse-keepers. That in the course of carrying on their trade, defendants were employed by merchants and others of *London* to enter at the custom house, and afterwards to land and house goods consigned from abroad, for reward, the defendants paying the duties, and also the freight and other charges, if required. That there is an ancient custom in the trade of public uptown warehouse-keepers, in *London*, for all such warehouse-keepers to have a general lien upon all goods housed or remaining in their warehouses, for all moneys or any balance thereof, &c. That defendants were retained by one *Heilbronn* to enter at the custom-house of *London* wools consigned to *Heilbronn* from abroad, and afterwards to land and house the same in the warehouses of defendants, in the name of *Heilbronn*, subject to his order, the defendants paying the duties and freight of the wools. That defendants did accordingly enter, land, and house the wools in the name of *Heilbronn*, and pay the duties freight, and other charges. That the amount of the entries, freight, and other charges so advanced by the defendants, &c. amount to 2000*l.* That part thereof, to wit, 1030*l.* 13*s.* 5*d.* is now due. That defendants delivered all the wools to order of *Heilbronn*, except 11 bales, part, &c. which remain in defendants' warehouses, and which they hold as and by way of lien for the said sum of 1030*l.* 13*s.* 5*d.*

Third Plea, That defendants were public uptown warehouse-keepers, in *London*: that in the course of their trade they were employed by *Heilbronn* to enter at the custom-house in *London*, wools consigned from abroad, and afterwards to land and house the same in their warehouses, for and in the name of *Heilbronn*, and subject to his order for reward, the defendants paying the duties and freight. That *Heilbronn*, in order to induce the defendants to continue to enter wools consigned from abroad, and afterwards to land and house the same in their warehouses, in manner and upon the terms last aforesaid, and to give *Heilbronn* credit for all advances which the defendants should make in respect thereof, by a memorandum in writing signed by him, gave the defendants a general lien on all wools which were then or should after-

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wards come into their possession, for all moneys which they had or should advance to him. That *Heilbronn* had in his possession bills of lading made deliverable to order, &c., and employed the defendants to enter at the custom-house certain bales of wool consigned from abroad, and to land and house the same in their warehouses in his name, subject to his order, they paying the duties and freight, &c., and that they, in pursuance of such retainer, did enter the wools, and pay the duties and freight, &c., and afterwards landed and housed the wools in their warehouses in the name of *Heilbronn*, and subject to his order. That the duties, freight, &c.

Fourth Plea, That defendants were public uptown warehouse-keepers [as in second plea, with a like custom set out]. That *Heilbronn* received wools consigned from abroad, and was in possession of twelve bills of lading of the said wools, deliverable to order, whereby he was enabled to hold himself out as the true owner of the wools (*a*). That *Heilbronn* delivered the said bills of lading to defendants, and employed them to enter the wools and to land and house the same in their warehouses in his name, and subject to his order, they paying the duties, freight, &c. That defendants did accordingly enter the said wools and afterwards land and house them, in the name of said *Heilbronn*, and subject to his order. That the duties, freight, &c.

Fifth Plea, That defendants were public uptown warehouse-keepers in *London* [as in second plea, with a like custom set out]. That before and at the time, &c. the plaintiff was a merchant carrying on business at *Frankenhausen* in *Saxony*, and that *Heilbronn* was agent, acting for the plaintiff in the city of *London*. That plaintiff consigned to *Heilbronn* wools from abroad, to be by him, as plaintiff's agent, entered at the custom-house, and for *Heilbronn* afterwards to land the same for and on account of the plaintiff, paying or causing to be paid all necessary duties and charges on account of the plaintiff. That *Heilbronn*, as the plaintiff's agent, employed the defendants as such public warehouse-keepers, to enter at the custom-house, on account of the plaintiff, divers bales of wool, and afterwards to land and house the same, they paying the duties, &c. That defendants did accordingly enter the wools at the custom-house for and on account of the plaintiff, and did pay the duties and also the said freight and other charges, at the request of *Heilbronn*, and did afterwards land and house the wools on account of the plaintiff, subject to the order of *Heilbronn*, as their agent. That they paid duties, freight, &c.

A rule having been applied for to a judge, for leave to plead several matters, the learned judge made an order, allowing the defendants to plead the general issue, and the second special plea, and such one of the other pleas as they might elect, with leave to apply to the Court for permission to keep all the pleas on the record.

R. V. Richards having obtained a rule accordingly,

W. H. Watson now shewed cause.—It is submitted that these pleas cannot all be allowed. The second sets up an ancient custom, which entitles the defendants to a lien upon the wools, and the third plea alleges a particular agreement, which gives them the lien; the defendants ought to rely on the custom or the agreement. The other pleas are substantially the same as the second, and are expressly forbidden under *Reg. 5, Hil. Term, 4 Wm. 4*,

(a) Vide Stat. 4 Geo. 4, c. 83, sec. 1.

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which is, "that all pleas founded on one and the same principal matter, but varied in statement, description, or circumstances only, are not to be allowed." If there could be any doubt upon the construction of this rule, it would be solved by one of the illustrative examples which follows, *viz.* "But pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed." Here the statements in these pleas are varied in very slight circumstances, which is unnecessary, because if any variance should occur at the trial, between the custom alleged and that which is proved, it might be amended under *Stat. 3 & 4 Wm. 4, c. 42, sec. 23*. The general issue is totally unnecessary with the other pleas.

R. V. Richards, contrd.—The practice at chambers, as to the allowance of several pleas, has not been uniform, and defendants are placed in circumstances of difficulty. When a plaintiff declares generally in an action of trover, as in the present instance, the defendant is totally ignorant of the manner in which he intends to shape his claim, and if he wishes to put several pleas upon the record, he is obliged to attend before a judge at chambers (*b*), the plaintiff's attorney being present, and to disclose the grounds of his defence, before he is permitted to retain several pleas. This was thought so unfair, as against defendants, that one of the learned judges always heard the statement of the defendants attorney, in the absence of the attorney on the other side. Here, although the custom of the uptown warehouse-keepers is alleged in different terms, it is submitted, that the defendants ought to be allowed to keep all the pleas upon the record. It has been already decided that several defences may still be allowed, although they are inconsistent (*c*). It has been suggested that amendments are now made when there is a variance between the statement on the pleadings and the proof; but this has proved very inconvenient in practice, as parties complain that they are taken by surprise, and new trials are frequently sought for upon that ground.

TINDAL, C. J.—The only question in this case is, whether the pleas are substantially the same, and varied only in statement, description, or circumstances.—[His Lordship here pointed out the differences between the several pleas.]—On the whole I cannot see that they are substantially the same, and therefore they ought to be allowed. If, however, the Court is mistaken in this view of the case, the plaintiff will suffer no loss, as he may, after the trial of the cause, apply to the judge before whom the trial is had, and if the judge should be of opinion that no distinct subject matter of complaint was *bonâ fide* intended to be established in respect of each plea which is now allowed, he may certify that the defendant shall not recover any costs on the issues arising out of such pleas (*d*).

Rule absolute.

(*b*) Reg. Gen. Hil. 4 Wm. 4, No. 6.
 (*c*) Vide *Hart v. Bell*, ante, p. 6.

(*d*) Reg. Gen. Hil. 4 Wm. 4, No. 7.

LAYTHORPE v. BRYANT.

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 Jan. 15th.

ASSUMPSIT. The declaration stated that the plaintiff *caused to be put up and exposed to sale by public auction, a certain lease of a certain house, shop, and premises, for a certain unexpired term therein*, to wit, for the unexpired term of 25 years, upon and subject to the following amongst other conditions of sale:—*Fourthly*, That the purchaser should have and accept an assignment of the lease under which the said vendor held the same, and which, agreeable to a clause in the lease, was to be furnished by the solicitor for the time being of the original ground landlord, at his own expense, on completing the purchase agreeably to said fourth condition, *and should not require the production of any title prior to such lease*. That if the purchaser should fail to comply with the said conditions, the deposit money should be actually forfeited to the vendor, who should be at liberty to proceed to another sale, either by public auction or private sale, without notice to the purchaser, and that whatever deficiency might arise, together with all charges attending the same, should immediately after such resale be made good by the defaulter, and in case of the non-payment of the same the whole should be recoverable by the vendor, as and for liquidated damages.—[The declaration then stated that at the sale the defendant purchased the premises and signed an agreement to that effect].—*And although the said plaintiff was possessed of such lease as aforesaid for the said unexpired term in the said condition mentioned*, and did afterwards, to wit, &c. produce such lease to the said defendant, and then and there request the said defendant to accept an assignment thereof, &c.; yet the said defendant not regarding, &c. did not nor would accept such assignment of the said lease.—[It was then stated that the premises were resold, for 194*l.* 5*s.* less than the original price, which, with the auction duty and expenses, was the sum sought to be recovered].—*Plea*, the general issue.

The cause came on for trial before *Park, J.*, at the adjourned sittings at *Guildhall*, after last *Trinity Term*, when it appeared that the defendant had attended the auction and become the highest bidder for the premises, and that he had signed an agreement that he was the purchaser. A few days after the sale, an abstract of title was forwarded to the defendant, which he returned the next day, stating that he had attended the sale, at the request of the plaintiff, for the purpose of keeping up the biddings, and that he altogether disclaimed being a purchaser. The plaintiff then resold the premises, and commenced the present action. At the trial, the plaintiff proved the execution of the mesne assignments of the term to himself, but failed to prove the execution of the lease for 25 years, and the learned judge thereupon directed a nonsuit to be entered.

During the last term *Bompas, Serjt.*, obtained a rule *nisi* for a new trial, on the ground that the plaintiff was not bound to prove the execution of the original lease.

Wilde, Serjt., and *Busby*, now shewed cause.—The plaintiff in his declaration alleges that he “caused to be put up and exposed for sale a certain lease of a certain house for a certain unexpired term therein,” of which the defendant became the purchaser, and then in a subsequent part of the

1. Where the plaintiff stated in his declaration that he was possessed of a certain lease of a certain premises for a certain term of years, which he put up for sale, and which the defendant purchased; in an action for not completing the purchase, the plaintiff in proving his title must prove the execution of the original lease as well as of the mesne assignments to himself.
2. If the assignee of a term brings an action against a purchaser for not completing the purchase, *quere*, whether he is bound to prove the execution of the original lease.

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pleadings it is stated, "and although the said plaintiff was possessed of such lease as aforesaid for the said unexpired term," the defendant refused to accept an assignment of the same. Here the plaintiff alleges that the lease was the very subject of the sale; he avers upon the face of his declaration that he was possessed of a lease, and at the trial he only proved the execution of an assignment of a lease. He was not prepared to prove the validity of that which was the subject matter of the contract, *viz.* the original lease made to the party under whom he claimed as assignee. *Johnson v. Mason (a)*, was cited at the trial, as an authority for the plaintiff, and now *Thompson v. Miles (b)*, will be relied on to shew that he was not bound to prove the execution of the lease. On the other hand, *Crosby v. Percy (c)*, is directly at variance with the latter case. There, a similar action to the present was brought, and the plaintiff was third or fourth assignee of the term, for which the premises were held, and Sir *James Mansfield* held that the lease, as well as all the mesne assignments, must be proved. This case is frequently referred to in the various treatises on the Law of Evidence, as an authority upon another point which it decided, and no doubt is expressed of its authority. Nothing can be more precise than the rule there laid down by Sir *James Mansfield*, and it is directly in point with the present case, even if the plaintiff had not, by his pleadings, taken upon himself the burthen of proving the lease. But here the plaintiff is bound to prove the averments in his declaration. The fourth condition of sale is also very material; it is "That the purchaser should have and accept an assignment of the lease under which the said vendor held the same, and should not require the production of any title prior to such lease." Here the vendor undertakes to prove the execution of the lease in express words. The execution of the contract by the vendee, is no acknowledgment of the title of the vendor. It may be a very material question for the vendee to ascertain whether the lease was duly executed. Under such a contract as this, it is not enough for the vendor to prove that he is in possession of the property. It has been decided, that if a contract be made for the sale of a leasehold property, unconditionally, the vendor is bound to shew to the satisfaction of the purchaser that his lessor or the original grantor of the term, was entitled to grant the lease. *Purvis v. Rayer (d)*.—[*Bosanquet, J.*—In Mr. *Starkie's (e)* book, on Evidence, several cases are cited the other way].

Bompas, Serjt., and *Steer, contra.*—The practice at *nisi prius* respecting the proof of the lessor's title, is as laid down by Lord *Kenyon*, in *Thompson v. Miles (f)*. There, deeds were produced as evidence of title, and it was objected that the subscribing witnesses should be called to prove their execution; but that learned judge said "he would never allow it, that where the question was respecting a title, that the party should be called upon to prove the execution of all the deeds deducing a long title: that it was never mentioned in the abstract, or expected in making out a title in any case of a purchase, more particularly where possession had accompanied them." The Treatises on the Law of Evidence, have also laid down this doctrine, as a general rule which is established, *Peake's Evidence*, 5 ed. 237. In *Crosby*

(a) 1 Esp. N. P. C. 88.
(b) 1 Esp. N. P. C. 183.
(c) 1 Camp. N. P. C. 303.

(d) 9 Price, 488.
(e) 2 Starkie Ev., 864, 2d ed
(f) 1 Esp. N. P. C. 183.

v. Percy (g), which is relied on, on the other side, the objection which was taken was not material, for it appears by the Report that the plaintiff immediately proved the execution of the deed, and recovered a verdict (*h*). But without reference to this general rule which prevails, the plaintiff is not bound in this case to prove the execution of the lease. It is said that the condition of sale stipulates, that the vendee shall not require the production of any title prior to the lease; but *production* does not mean *proof*. The lease was produced, and that was sufficient. The same condition states that the purchaser shall accept an assignment of the lease, under which the vendor held the premises. Now an assignment of this lease was proved at the trial, and no doubt was thrown upon the validity of the lease. The assignment was indorsed upon the back of the lease; and in *Nash v. Turner (i)*, Lord *Kenyon* ruled, that where an assignment was indorsed upon a lease, it was sufficient to prove the execution of the assignment, for it had adopted the original deed in all its parts, and was therefore to be considered as one deed. Another ground why the defendant was estopped from setting up this objection is, that when the abstract of title was given to him, no objection was raised, as to the validity of the lease; he could not, therefore, afterwards insist that the lease was not legally proved.

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TINDAL, C. J.—I am of opinion that this case may be decided upon the circumstances of the transaction, without laying down any general rule. Generally speaking, when an agreement has been entered into for the sale of lands or houses, an abstract is given by the vendor to the vendee. Some correspondence then ensues between their respective attorneys, either in writing or by word of mouth; the questions raised upon these occasions are generally questions of law, and not of fact, and it would be too much to say that the parties, who during this correspondence, have raised no objection, are at liberty to turn round and make objections, which they had not entertained before. But the present case may be perfectly denuded of such circumstances as these. The abstract is returned with the simple answer that the defendant does not recognise the contract, and nothing occurs to shew that the defendant admitted that the deeds mentioned in the abstract, were valid and well executed. The point in this case arises on the plaintiff's declaration. He alleges that he "is possessed of a certain lease described in the conditions of sale," and as he has chosen to allege this fact, he is bound to prove it, and ought therefore to have given evidence of the execution of the deed. If the plaintiff had desired to avoid the necessity of proving the execution of the lease, it could have been easily effected, by introducing a clause to that effect in the conditions of sale. It is a general rule of law, that deeds must be proved by calling the attesting witnesses, unless the case falls within the exceptions to that general rule. I prefer deciding this case on its own peculiar circumstances, without touching either of the two cases at *Nisi Prius*, which are at direct variance with each other.

VAUGHAN, J.—Under the particular circumstances of this case, as the

(g) 1 Camp. N. P. C. 303.

(h) Sir *E. Sugden*, after referring to *Crosby v. Percy*, *supra*, says, "Lord *Kenyon's* decision was not however adverted to; and as that clearly coincides with the

practice in these cases, it can scarcely be considered as overruled." Vend. & P. 9 ed. 241.

(i) 1 Esp. N. P. C. 217.

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plaintiff has stated that he was possessed of the lease, the averment ought to have been proved.

BOSANQUET, J.—It is not necessary to decide the main question which has been argued, namely, whether it is necessary in general to prove the original lease as well as the intermediate assignments. In the present case, the instrument which is not proved, is the very foundation of the action; it is the very thing which is alleged to have been sold, and the plaintiff was bound to prove his allegation. I do not found my decision upon the fourth condition of sale, which has been commented upon; but here a certain estate is said to have been created by the lessor, and it is necessary that the plaintiff should prove he was possessed of that estate, as it is described in the declaration.

PARK, J.—As I nonsuited the plaintiff at the trial, I have deferred giving my opinion. The cases decided at *Nisi Prius* are certainly extremely unsatisfactory; but upon the present occasion it is not necessary to lay down any general rule. I thought that if a party avers in his pleading that he is possessed of a lease, he is bound to prove it. I think the terms of the fourth condition of sale are material; for I do not think the production there mentioned is satisfied, by the party producing a piece of parchment, and merely stating that to be the deed described in the declaration.

Rule discharged.

Jan. 24th.

DAVY v. BROWN.

When a judgment is set aside for irregularity on summons before a judge at chambers, and no order is made as to costs, the Court refused to order the payment of the costs of setting aside the judgment, but discharged a rule obtained for that purpose with costs.

AN application had been made before Mr. Justice *Park* at chambers, to set aside a judgment which had been signed by the plaintiff. The learned judge was of opinion, that the judgment was irregular, and the plaintiff's attorney then said, he would waive his judgment in deference to that opinion. The defendant's attorney asked for the costs of setting aside the judgment, but the learned judge made no order thereupon, and dismissed the summons.

Wilde, Serjt., now shewed cause against a rule which had been obtained, calling upon the plaintiff's attorney to shew cause why he should not pay the costs of setting aside the judgment, and the costs of the present rule. He submitted that the decision of the judge at chambers was conclusive, and that the rule ought to be discharged.

Miller contended, that as the judgment was clearly irregular, the defendant was entitled to receive the costs of setting it aside.

TINDAL, C. J.—As these proceedings began at the judge's chambers, so they ought there to have ended. When the plaintiff's attorney said that he waived his judgment, the defendant's attorney ought to have considered that full effect had been given to the application, which he had thought it proper to make to the judge at chambers. The judge had the subject of costs suggested to him, but he made no order for the payment of them. It is only common humanity to plaintiffs and defendants, not to allow a claim like this for seven or eight shillings, to be made a stepping stone to a further bill of costs for 12*l.* or 13*l.* This rule must be discharged, and with costs.

PARK, J.—I do not generally give costs at chambers upon such an occasion as this.

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VAUGHAN J.—This case would prove a dangerous precedent if we did not discharge it with costs. If such applications were encouraged, it would multiply the expense of legal proceedings beyond all bounds.

BOSANQUET, J.—Concurred.

Rule discharged with costs.

ORR and others v. BOWLES.

Jan. 31st.

HAYWARD shewed cause against a rule which had been obtained, calling upon the plaintiffs to give security for costs. The plaintiffs were formerly carrying on business in *France*, in partnership, but in 1830, one of the partners came over to this country, where he has since resided. By the affidavit it appeared, that the defendant was aware that the plaintiff was in this country, the defendant having called at the plaintiff's house at *Brompton*. It is submitted, that if one plaintiff is resident in this country, the defendant is not entitled to ask for security for costs. *Anonymous (a)*.

If one of three plaintiffs is resident in this country, and the other two are residing abroad, the defendant is not entitled to security for his costs.

Wilde, Serjt., in support of the rule, cited *Limerick Railway Company v. Fraser (b)*, where a public company carrying on all their business in *Ireland*, were compelled to give security for costs, although most of the members resided in *England*.

TINDAL, C. J.—The plaintiffs, in this case, are trading on their own account; one of them resides in this country, and that fact was within the defendant's knowledge. The rule must be discharged with costs.

The rest of the Court concurred.

Rule discharged.

(a) 7 Taunt. 307.

(b) 4 Bing. 394.

TROTTER v. BASS.

Jan. 31st.

SEWELL had obtained a rule, calling upon the plaintiff to shew cause why an order, made by a learned judge, should not be rescinded. The action was brought on a bill of exchange for 25*l*., which was the sum claimed by the writ; and the declaration and particulars of demand contained a claim of the same amount. The plaintiff applied to a judge at chambers for an order that the issue joined should be tried before the sheriff, under sec. 27. *Stat. 3 & 4 Wm. 4*, c. 42, admitting that only 15*l*. was claimed in the said action. The learned judge ordered the writ to be altered from 25*l*. to 15*l*., and directed that the issue should be tried in the Sheriffs' Court.

Upon cause being shewn on a subsequent day, the Court were clearly of opinion, that the action having been brought for a sum above 20*l*., the judge had no power to send the cause for trial to the sheriff, although the plaintiff offered to waive a part of his claim.

Rule absolute.

Where an action is brought for a sum above 20*l*., and the plaintiff subsequently reduces his claim to a sum less than 20*l*., a judge has no power to send the issue for trial to the Sheriffs' Court, under *Stat. 3 & 4 Wm. 4*, c. 42, sec. 27.

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Jan. 15th.

DOE dem. Lord SOUTHAMPTON v. ROE.

Service of a declaration in ejectment on the wife of the tenant, at her husband's residence, is sufficient, although the husband does not reside on the premises sought to be recovered.

CHANNELL moved for judgment against the casual ejector.—The service of the declaration was upon the wife of the tenant in possession, at his dwelling-house, but the dwelling-house was no part of the premises sought to be recovered.

The Court held the service to be sufficient.

Rule granted.

See *Doe & Briggs v. Roe*, 2 Cr. & J. 202; *Anon.* 1 Chit. Rep. 500, n.; *Tucker v. Roe*, 4 Moore & Scott, 165; *Doe & Wingfield v. Roe*, 1 Dow. P. C. 693.

ABBOTT and an^r Assignees of BAKER, a Bankrupt, v. POMFRET and an^r

Jan. 24th.

Where a bankrupt, in contemplation of bankruptcy, pays money to A. his banker, to redeem bills of exchange in his hands, for the payment of which B. is ultimately responsible, with a view to make a fraudulent preference of B. the assignees cannot recover back the amount from A.

ASSUMPSIT. The declaration stated that the defendants were indebted to the plaintiffs as assignees, for money received by the defendants for the use of plaintiffs, and in a second count for the forbearance by the plaintiffs, as assignees, of moneys due and owing from defendants to plaintiffs. *Plea*, the general issue. It appeared at the trial before *Littledale, J.*, at the last assizes for *Sussex*, that the action was brought to recover the sum of 200*l.* received by the defendants of *Baker*, before his bankruptcy, under the following circumstances. *Baker* was a trader, residing at *Rye*, in *Sussex*, and the defendants were his bankers, carrying on their business at the same place.

On the 4th of *December*, 1832, *Baker* being then in embarrassed circumstances, drew an accommodation bill, at one month, for 200*l.* upon one *Mills*, who accepted the same, and the defendants, at *Baker's* request, discounted the said bill, and placed the amount to his credit, in the account which he kept with them as bankers.

The bankers were informed by *Mills* that he (*Mills*) had been guaranteed against loss in consequence of his accepting this bill, by one *Lawrence*.

On the 7th of *December*, 1832, *Baker* induced *Lawrence* to accept a bill drawn by him at one month, for 184*l.* 2*s.* 4*d.* which the defendants also discounted at *Baker's* request, in the same manner as the above-mentioned bill for 200*l.*

Previously to the bills becoming due, *Baker* paid to his credit at the defendants' bank, a sum of money exceeding the amount of the two bills, and on the 3d of *January*, 1832 (the 200*l.* bill being due on the 7th of that month, and the bill for 184*l.* 2*s.* 4*d.* on the 10th), *Baker*, accompanied by *Lawrence*, came to the defendants' banking house, and *Lawrence* presented two checks drawn upon the defendants by *Baker*, one for 200*l.* and another for 184*l.* 2*s.* 4*d.*, and at the same time requested that the two bills might be delivered to him in exchange for the cheques, which was accordingly done, and the bills were cancelled.

A fiat in bankruptcy was issued against *Baker* on the 9th of *January* following, and the plaintiffs were chosen assignees, who brought an action against *Lawrence* to recover the said sum of 384*l.* 2*s.* 4*d.*, the amount of the two bills so paid to him as aforesaid, which it was alleged was a fraudulent preference. At the trial they recovered a verdict for 184*l.* 2*s.* 4*d.* (the amount of the bill accepted by *Lawrence*), but they failed to identify him with the bill accepted by *Mills*.

The assignees then commenced the present action against the defendants, to recover the amount of the bill for 200*l.*, but at the trial the plaintiffs were nonsuited, the learned judge not considering that there was any proof of a fraudulent preference of the defendants, but he reserved leave to the plaintiffs' counsel to move to enter a verdict for the plaintiffs.

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Spankie, Serjt., having obtained a rule *nisi*, accordingly, on a former day,

Wilde, Serjt., *Thesiger*, and *Channell*, now shewed cause. The plaintiffs originally considered that *Lawrence* was the party who alone could be benefitted by the payment of these two bills of exchange, and therefore, they sued him for the whole amount of both, and having failed in that action, as to the 200*l.* bill, they now seek to charge the present defendants. By recovering in that action, the amount of the one bill, they established the principle which is applicable to the whole of this transaction; there was nothing but a fact wanting, *viz.*, proof of the guarantee given to *Mills* by *Lawrence*, to have entitled the plaintiffs to recover for the whole amount against *Lawrence*, and it was as much a fraudulent preference of him, by paying the amount of one bill as the other. He was liable to pay both; one as acceptor, the other as a guarantee for the drawer. But a question arises whether there was any fraudulent preference in the present case. It was not sufficient to shew that *Baker* was in insolvent circumstances when he gave the checks to *Lawrence*; it was necessary to go further, and prove that the payment was made in contemplation of bankruptcy, *Morgan v. Brundrett* (a). *Wheelwright v. Jackson* (b). In the former case, Mr. Justice *J. Park* said, that the cases upon this subject had gone too far. Here, too, the plaintiffs are obliged to contend for two different intendments, as resulting from one act.—First, an intention to prefer *Lawrence* as to the payment of 184*l.*; and secondly, an intention to prefer the defendants, as to the payment of the 200*l.* But it is clear that the bankrupt's good intentions were directed towards *Lawrence*, and not the defendants. The bankrupt could have had no motive for paying the money to the defendants, for they had already good security in their hands.—[*Tindal*, C. J.—In four or five days, if nothing had been done, the bankers might have paid themselves.]—The effect of the payment made, was to discharge *Lawrence* from liability, *Guthrie v. Crossley* (c).

Spankie, Serjt., and *Platt*, for the plaintiffs.—There can be no doubt but that *Baker* at the time he drew these checks was in insolvent circumstances. The giving up of the bills before they became due was not a transaction which is usual amongst bankers. *Lawrence* must be considered as *Baker's* agent, and the delivery of the bills to *Lawrence* is the same as a delivery to the bankrupt himself. At that time *Lawrence* was not the bankrupt's creditor as to the 200*l.*, for *Mills* had accepted the bill, and he might have had a remedy over against *Lawrence*, if he had been called upon to pay the amount; but at the time the payment was made, *Lawrence* was not a creditor. This was an accommodation bill, and the money raised on it was in reality advanced by the defendants; for, on the 3d of *January*, neither

(a) 5 B. & Ad. 297.
(b) 6 Taunt. 109.

(c) 2 Car. & P. 801.

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Mills nor *Lawrence* were creditors of *Baker*. The effect, therefore, of the payment on the 3d of *January* was a payment to the defendants.

TINDAL, C. J.—The plaintiffs are not entitled to recover in the present action, unless they can shew that a fraudulent preference of the defendants by the bankrupt, was intended when the checks were paid. It is not difficult to understand that on account of relationship or friendship, or it may be through gratitude, or some other motive, an insolvent debtor may select particular individuals from the crowd of creditors, and make payments to them, with an intention to prefer them to others. But it has been contended in the present case, that if from such an illegal motive with respect to A., the bankrupt pays money to B., that the assignees may sue B. for the money so paid. But I think that this would be carrying the law upon this subject, an alarming step further than any of the cases warrant. In the present case is there any ground for supposing that a fraudulent preference of the defendants was intended? I can find no evidence of any such intention; *Lawrence* had undoubtedly been a friend to the bankrupt, and he being immediately liable to pay one bill, and ultimately liable to pay the other, we can suppose that the bankrupt was anxious to save his friend, and it was not unnatural that he should endeavour to withdraw the two bills from the hands of the defendants. But the plaintiffs have put their own seal upon this part of the transaction. They sue *Lawrence* for the amount of both bills, and have recovered the amount of one of them; but I can see nothing to distinguish one case from the other, the only difference was that the proof was more difficult, and the plaintiffs not being prepared to prove that *Lawrence* had given a guarantee to *Mills*, they did not recover the amount of the bill which was accepted by *Mills*. Under these circumstances, I think the nonsuit was right, and I see no ground for setting it aside.

PARK, J.—The plaintiffs themselves sued *Lawrence*, as the man whom the bankrupt had preferred, and they could have recovered the amount of both bills, if they had connected him with the bill for 200*l*. Upon that ground I think the nonsuit was right.

VAUGHAN, J.—There is not the slightest ground for disturbing this nonsuit. The question is, was the money paid to the defendants by way of fraudulent preference? The payment of the checks by the bankers was in the ordinary course of their business; the bankrupt had a sum of money in their bank, and they were bound to pay the checks.

BOSANQUET, J.—Sufficient grounds have not been laid before the Court to induce them to disturb this nonsuit. Here money is paid into a banker's hands before an act of bankruptcy is committed, and some fraud on the bankrupt laws must be shewn, to entitle the plaintiffs to recover. Is this a case of that description? The defendants discounted two bills, whereby they became their property. The bankrupt, contemplating bankruptcy, pays in a sum of money to the bank, with a view of enabling *Lawrence* to purchase the two bills the property of the bankers. The bankrupt then draws checks in *Lawrence's* favour, and it was for his benefit that the whole transaction occurred.

Rule discharged.

GREEN v. GLASEBROOK.

Com. Pleas.

Jan. 31st.

WILDE, Serjt., shewed cause against a rule which had been obtained, calling upon the plaintiff to shew cause why a sum of money, paid into Court, in lieu of bail above, under Stat. 7 & 8 Geo. 4, c. 71, sec. 2, should not be restord to the defendant, upon the ground that the affidavit by which he had been held to bail was defective. It is contended that the present application cannot now be sustained. The object of the affidavit of debt is to bring the defendant into court; and he having chosen to deposit the money, and enter an appearance, in pursuance of the Statute, which is equivalent to bail above, it is too late to take the present objection.

If a defendant pays money into Court in lieu of bail above, in pursuance of Stat. 7 & 8 Geo. 4, c. 71, he cannot afterwards object that the affidavit by which he was held to bail is defective.

Taddy, Serjt., in support of the rule, said it would be very hard upon the defendant if he could not avail himself of a valid objection to the affidavit by which he had been held to bail. The defendant was compelled to enter an appearance, in pursuance of the Statute, but it was done under protest that the present application would be made, as soon as it was possible to do so.

TINDAL, C. J.—It appears to me, that the Statute 7 & 8 Geo. 4, c. 71, is very beneficial to defendants. It imposes no duty upon them, but it gives them an option and a choice; instead of putting in and perfecting special bail, they may deposit a sum of money into Court, which is to await the event of the suit: and thereupon the defendant is required to enter a common appearance, or file special bail, within such time as he would have been required to put in and file special bail in the action. As the defendant has chosen to avail himself of this Statute, he cannot take this objection.

The rest of the Court concurred.

Rule discharged.

ROLFE v. BROWN.

Jan. 29th.

WIGHTMAN moved for a rule *nisi*, with a stay of proceedings, to set aside a judgment and subsequent proceedings, on the ground of irregularity. The defendant makes oath, that he had a writ of summons served upon him, but that he had received no further notice that the action was proceeding, until an execution was levied to recover the debt and costs. He has since ascertained, that the declaration and other proceedings had been served on his father, who had a different residence.

An application to set aside a judgment and execution for irregularity, will not be granted, with a stay of proceedings, unless notice of the application has been given to plaintiff.

PARK, J. (who was sitting alone).—Take a rule *nisi*, but you are not entitled to stay the proceedings, as you have not given the plaintiff notice of this application.

Rule granted.

Com. Pleas.
Jan. 22d.

MOORE v. STRONG.

If goods are supplied by *A.* to *B.* and five years afterwards there are mutual dealings between the parties, *Quere*, whether the first item comes within the exception of merchants' accounts in the Statute of Limitations.

ASSUMPSIT for goods sold and delivered and on an account stated.—*Plea* 1st. *Non assumpsit.* 2dly. A set-off for goods sold and delivered by defendant to the plaintiff.—*Replication* to the second plea. That the said supposed debts and causes of set-off in the said plea mentioned, did not nor did any, or either of them, or any part thereof, accrue to the defendant at any time within six years next before the commencement of this suit in manner and form, &c.—*Rejoinder.* That the said debts, &c. did accrue to the said defendant within six years, &c., and issue thereon.

At the trial before the Secondary, it appeared that in October, and November, 1825, the defendant, who was a wine merchant, supplied the plaintiff, then out of business, with goods to the amount of 9*l.* 12*s.* No further dealings took place between the parties, until June, 1830, when the plaintiff, who was then trading as a grocer, supplied the defendant with goods, which he continued to do from that time till 1833, when the whole amounted to 25*l.* 1*s.* 3*d.* Between June, 1830, and 1833, the defendant also supplied the plaintiff with goods to the amount of 16*l.* 12*s.* If the 9*l.* 12*s.* was added to the 16*l.* 12*s.* then the balance of account was in defendant's favour. A witness was called by the defendant, to prove that the goods delivered by the plaintiff to the defendant in 1830, were supplied in reduction of the debt incurred in 1825, but it was objected that this would indirectly have the effect of giving parol evidence, to take the case out of the Statute of Limitations, contrary to the provisions of Lord Tenterden's Act (a). The Secondary rejected the evidence, and the jury found a verdict for the plaintiff.

Cottingham obtained a Rule *nisi* for a new trial, on the ground that this witness was improperly rejected.

Humfrey shewed cause.—It will be contended that this case is within the exception of merchants' accounts, in the Statute of Limitations, and that therefore the evidence was admissible. But it is submitted that there were no mutual dealings between these parties until 1830, when goods were furnished on both sides. The exceptive words in the Statute are "other than for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants."—[*Tindal*, C. J.—This exception is not confined to the accounts of persons who are actually merchants: it has been extended to other persons who are not merchants, but the accounts must be mutual.]—*Callling v Scoulding* (b) may be relied on on the other side, but there the items commenced on each side in 1779. In *Cotes v Harris* (c) *Dennison*, J., held that the clause in the Statute of Limitations about merchants' accounts, extended only to cases where there were mutual accounts and reciprocal demands between two persons. But if there were only a demand by *A.* against *B.* in the common way of business, as by a tradesman on his customer, that cannot be called merchants' accounts.—

(a) Stat. 9 Geo. 4, c. 14, s. 1.
 (b) 7 T. R. 192.

(c) Bul. N. P. 150.

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[*Park, J.*—There were no mutual accounts in that case.]—In *Cranch v. Kirkman (d)*, *Lord Kenyon*, in remarking on the last cited case, observes that “he agreed that where the demand of one party arises long after the demand of the other, that shall not revive the antecedent account.”—In the present case, nearly five years intervened between the supply of the first parcel of goods to the plaintiff, and the time when mutual accounts commenced between them.—[*Tindal, C. J.*—Do you contend, that if goods are supplied by one party in the year 1825, and by the other in the year 1826, that the case would not be within the exception ?]—In that case the argument would not apply.—[*Tindal, C. J.*—You have put an extreme case on the one side, and I now put an extreme case on the other.]—*Lord Kenyon* excepts the case where the demand of one party arises long after the demand of the other, and he must mean some time less than six years.—[*Bosanquet, J.*—You admit there were merchants’ accounts from a certain period ?]—Yes, from 1830, when the accounts became mutual.—[*Tindal, C. J.*—You must take yourself to 1830 ; at that time the plaintiff owes the defendant money, and supplies him with goods.]—If the first item in the account is not within the exception in the Statute, as to merchants’ accounts, then the evidence was properly rejected, as it would have the effect of allowing parol evidence of an acknowledgment to take the case out of the Statute of Limitations. Another objection is, that if the defendant had relied upon the accounts being merchants’ accounts, he ought to have stated that in his rejoinder, instead of joining issue on the replication.

TINDAL, C. J.—This case may be determined without reference to the Statute of Limitations. It appears that the sheriff refused to receive in evidence a conversation, between the plaintiff and a witness, because it would indirectly have the effect of receiving parol evidence of an acknowledgment, to take one of the items in the set-off, out of the Statute of Limitations. But I think the evidence ought to have been received, for I cannot say that it would not have appeared, that these very goods, supplied by the plaintiff in 1830, were intended as a set-off to the price of the goods, supplied by the defendant to the plaintiff in 1825 ; and it would be strange if the plaintiff might wait until six years had expired from the time when he purchased the first goods from the defendant, and then sue him for the goods so supplied by him, by way of set-off. I decide the case upon this ground, without reference to the Statute.

The rest of the Court concurred.

Rule absolute.

Com. Pleas.

Jan. 28th.

LOWE v. GRIFFITHS.

Where an infant rented a house, and exercised his calling therein as a barber, *Held* that it was properly left to the jury to decide, whether it came within the term of necessities; *Seemle* that there is no distinction between a trade carried on by a minor, and his occupation in a manual employment, and that he is not liable for the rent of a house taken for either purpose.

ASSUMPSIT for use and occupation. *Plea*, infancy. The cause was tried before *Alderson*, B., on the last *Oxford* circuit, when it appeared that the defendant had served his apprenticeship as a barber, and being desirous of exercising his calling, he took a house of the plaintiff, consisting of two rooms on the ground floor, one of which was used as a shop, and three rooms up stairs; the rent agreed to be paid was 8s. per week, and the defendant occupied the premises, exercising his calling, for about a year and a quarter, when the greater part of the rent being unpaid, the plaintiff brought the present action, the defendant being at that time a minor. The learned judge told the jury that a minor could not trade on his own account, and that he was only liable to be sued for necessities, and desired them to say if, under these circumstances, the plaintiff was entitled to recover. The jury found a verdict for the defendant.

In *Michaelmas Term* last, *Godson* had obtained a rule *nisi* for a new trial, on the ground that the learned judge did not draw the attention of the jury to the distinction between a trade, and the exercise of a manual occupation.

J. C. Talbot now shewed cause.—It will be said upon the authority of *Crisp v. Churchill* (a), that an infant may be sued for the price of a lodging, but here the defendant carried on a trade upon the plaintiff's premises, and no distinction has ever been drawn between the exercise of a trade, and a manual occupation. The jury have also found that the defendant occupied more than a mere lodging. *Kirton v. Elliott* (b), may also be cited to shew that an action lies against an infant for rent in arrear, upon a lease made to him during his infancy; but the same case is mentioned *nomine Keettle v. Eliot, Rolle's Abr.* (c), and there it appears that the infant continued in the occupation after he became of age, and that made him chargeable for the arrears which accrued during his infancy. *Ketsey's* case (d) is to the same effect. In *Evelyn v. Chichester* (e), it was held that the lord of a manor could maintain an action for a fine due upon the admittance of an infant copyholder; but there also the defendant had continued in possession of the estate after he became of age.

Godson, in support of the rule.—There is a manifest distinction between the case of an infant carrying on a trade, and one who uses a mere manual occupation, as in the present case. It is against the policy of the law to discourage an infant from obtaining his livelihood, by the exercise of his calling. This is not a trade used by the infant, and therefore the contract was not void upon the ground that the house was used for the purpose of a trade. It is clear that an infant is liable to pay for lodgings, *Lloyd v. Johnson* (f), and also for necessities, whether furnished to him or his family, *Turner v. Trisby* (g). The question is, whether this was or was not an imprudent act on the part of the defendant, to pay a small rent, which enabled him to obtain his livelihood by the exercise of his calling.

(a) Cited in *Lloyd v. Johnson*, 1 Bos. & Pul. 340.

(b) 2 Bulstrode, 69.

(c) 1 Roll. Abr. 730, tit. Enfants. (K).

(d) Croke Jas. 320.

(e) 3 Burr. 1717.

(f) 1 Bos. & Pul. 340.

(g) Str. 168; 1 Sel. N. P. 130, n. 76.

TINDAL, C. J.—It appears to me that the verdict in this case was properly found. The infant was carrying on a trade, or he was not. If he was, then he would not be liable for the hire of a house used for the purposes of his trade. If he was not a trader, then the question would be, whether the contract on which he was sued, was a contract for necessaries. The word necessaries is a term of a wide and accommodating meaning; it has been held to include not only food and clothing, but also the costs of education and instruction. It has also been held that a livery supplied to the servant of an officer in the army, came within the import of a necessary supplied to the master, the station of the individual having been such as to entitle him to keep a servant. In the present case, it was left to the jury to say whether it was necessary that the plaintiff, carrying on the business of a barber, should hire a house containing five rooms, and they found that it was not necessary. And I think the verdict should not be disturbed.

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PARK, J.—The question of necessaries must ever have respect to the station in life of the individual. In the present case, the house was not necessary for a person in the situation of the defendant. This was a question entirely for the jury, and especially where the sum in dispute is so trifling, the Court will not interfere.

VAUGHAN, J.—I am of the same opinion: there was nothing like a misdirection in this case; and the question of necessaries was properly left to the jury.

BOSANQUET, J.—On referring to the notes of the learned judge who tried the cause, it appears that he left it to the jury to say whether, under the circumstances, the house was necessary for the defendant or not. He does not recollect whether he drew the distinction between a trader, and a person using a mere manual occupation. My view of the case coincides with that of the jury.

Rule discharged.

MILLER v. MILLER.

Jan. 28th.

WATSON applied for a rule to shew cause why the demandant's count should not be set aside for irregularity; the same not being entitled, in pursuance of *Reg. Hil. T.*, 4 *W. 4* (a).—[*Tindal*, C. J.—Do those rules apply to real actions?—That is the question to be raised. It is submitted that by the true construction of the Statute 3 & 4 *Wm. 4*, cap. 42, taken in conjunction with the rules of *Hil. T.*, 4 *W. 4*, which were passed in pursuance of that Statute, that the rule above mentioned applies to all actions, whether real or personal. That act recites "that it would greatly contribute to the diminishing of expense in *suits* in the superior courts of common law at *Westminster*, if the pleadings therein were in some respects altered," and then in sec. 1, it is enacted, "That the judges of the said superior courts, or any eight or more of them, of whom the chiefs of each of the said courts shall be three, shall and

The rules passed in pursuance of Stat. 3 & 4 *Wm. 4*, c. 42, refer only to actions over which the Courts of Common Law have a concurrent jurisdiction, and therefore they do not extend to real actions.

(a) Which directs "that every pleading as well as the declaration, shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date."

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may, by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when this act shall take effect, make such alterations in the mode of pleading in the said courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law," as to them may seem expedient. The rule in question, upon which this motion is founded, was passed in pursuance of the power thus given to the judges, and the preamble to those rules recites the words of the Statute, which it is submitted are sufficiently large to include real as well as personal actions at law. The expression used in the rule is that *every* pleading shall be entitled, &c.

TINDAL, C. J.—It appears to me, that upon the just construction of the preamble and first section of the Stat. 3 & 4 Wm. 4, c. 42, that the power of the judges to make alterations in the mode of pleading, is confined to the proceedings in those suits in which the Courts have a concurrent jurisdiction; and no rule has been expressly made by this Court for altering the mode of proceeding in real actions. By Stat. 11 Geo. 4, and 1 Wm. 4, c. 70, sec. 11 (b), the judges are empowered to make general rules and orders in matters over which the Courts of Common Law have a common jurisdiction, and the latter Statute is *in pari materia* with the former one, and I feel no doubt upon the question.

PARK, J.—I am of the same opinion. The different courts have still peculiar jurisdictions in certain matters. Revenue causes are confined to the jurisdiction of the Court of *Exchequer*, and criminal proceedings issue from the Court of *King's Bench*.

VAUGHAN, B., concurred.

BOSANQUET, J.—The Stat. 3 & 4 Wm. 4, c. 42, manifestly relates to the same power to make rules, as is set forth in sec. 11 of the Stat. 11 Geo. 4, & 1 Will. 4, c. 70.

Rule refused.

(b) By sec. 11, "in all cases relating to the practice of any of the Courts of King's Bench, Common Pleas, or Exchequer, in matters over which the said courts have a common jurisdiction, or of or relating to the practice of the Court of Error before mentioned, it shall be lawful for the judges of the said courts jointly, or any eight or

more of them, including the chiefs of each court, to make general rules and orders for regulating the proceedings of all the said courts; which said rules and orders so made, shall be observed in all the said courts; and no general rule or order respecting such matters shall be made in any manner except as aforesaid."

JONES v. BROWN and o^{rs}

Com. Pleas.

Jan. 26th.

TRESPASS for breaking and entering a messuage of the plaintiff, and for taking divers goods and chattels of the plaintiff, then being in the said messuage. The defendants, as to the breaking and entering, suffered judgment by default. As to the residue of the supposed trespass, they pleaded, *first*, the general issue, *not guilty*: *Second Plea*, that the said goods, &c. were not nor were or was any or either of them, or any part thereof, at the said time when, &c., the goods, &c., of the plaintiff, in manner and form as the plaintiff hath above in his said declaration complained against them, the defendants.

Third Plea.—That long before the said time when, &c., to wit, on, &c., and from thence continually until the issuing of the commission of bankruptcy, hereinafter mentioned, one *Geo. Metcalfe* was a grocer, dealer, and chapman, within the meaning of and subject to an act, &c., passed, &c., intituled, “an Act to amend the Laws relating to Bankrupts,” and during all that time did use and exercise the trade of a grocer, dealer, and chapman, and was a trader within and subject to the provisions of the said act; and the said *George Metcalfe* so using and exercising the trade of a grocer, &c., afterwards, to wit, on, &c., became and was indebted to *P. C.*, &c., in the sum of 100*l.* and upwards, for a true and just debt, due and owing to him from the said *Geo. Metcalfe*, and the said *Geo. Metcalfe* afterwards, to wit, on, &c., became and was a bankrupt within the true intent and meaning of the said Statute; and that thereupon, a certain commission of bankruptcy under the great seal, &c., grounded upon the said Statute, upon the petition of the said *P. C.* was duly awarded and issued against the said *Geo. Metcalfe*, directed to certain commissioners therein named, to wit, &c. by which said commission our lord the king did name, assign, appoint, constitute, and ordain them his special commissioners, thereby giving full power and authority to them; four or three of them to execute the said commission according to the said Statute, &c., by virtue of which said commission, and by force of the said statute concerning bankrupts, the major part of the said commissioners having respectively duly taken the oath, &c., afterwards, to wit, on, &c., did in due form of law find that the said *Geo. Metcalfe* had become bankrupt within the true intent of the said Statute, and did then and there declare and adjudge him to be a bankrupt accordingly; and the defendants further say, that afterwards, to wit, on, &c.—[The plea here set forth the proceedings under the commission; the choice of *P. C.* and *E. M.* as assignees, and the assignment of the bankrupt’s effects to them upon certain trusts.]—And the said defendants further say, that before and at the said time when, &c., in the said declaration mentioned, the said goods, chattels, and effects in the said declaration mentioned, were the goods, chattels, and effects of the said *P. C.* and *E. M.*, as such assignees as aforesaid, and which said goods, chattels, and effects, just before the said time when, &c., and whilst the said *Geo. Metcalfe* remained and continued such bankrupt as aforesaid, were in the possession of the said *Geo. Metcalfe*: and the said defendants further say, that the said goods, chattels, and effects, so being the said goods, chattels, and effects of the said *P. C.* and *E. M.*, as such assignees as aforesaid of the said *Geo. Metcalfe*, remaining such bankrupt as aforesaid, the plaintiff claiming title to the said goods, chattels, and effects in the said declaration mentioned, under colour of a certain gift, pretended to have been thereof made

Trespass for taking plaintiff’s goods. The defendants, by a special plea, state that one *A.* became a bankrupt, and the issuing of a commission, and the assignment of effects to the assignees, is then set forth in the usual form. That said goods were the property of the assignees, but that the plaintiff claiming title under colour of a certain gift, pretended to have been made thereof by the bankrupt, seized and took the goods, and, therefore, the defendants, as the servants of the assignees, justified the trespass. *Replication*, that the said goods were not the goods of the assignees, but were plaintiff’s goods. *Held*, that the proceedings under the Commission of Bankruptcy were admitted by the replication, and that the only point in issue, was the property in the goods.

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to him by the said *Geo. Metcalfe*, whereas nothing of or in the said goods, chattels, and effects, in the said declaration mentioned, ever passed by virtue of that gift; afterwards and before the said time when, &c., and whilst the said goods, chattels, and effects in the said declaration mentioned were the goods, chattels, and effects of the said *P. C.* and *E. M.*, as such assignees as aforesaid, and whilst the said *Geo. Metcalfe* remained such bankrupt as aforesaid, to wit, on, &c., in the said declaration mentioned, seized and took, and became and was possessed of the said goods, chattels, and effects in the said declaration mentioned; and thereupon the defendants, on the day and year in the said declaration in that behalf mentioned, as the servants and by the command of the said *P. C.* and *E. M.*, so being such assignees as aforesaid, seized, took and carried away the said goods, chattels, and effects in the said declaration mentioned, so being in the possession of the said plaintiff as aforesaid, as they lawfully might for the cause aforesaid, which are the same supposed trespasses, &c.

Replication—as to the two first pleas, *similiter*.

And as to the said plea of defendants, by them lastly above pleaded, the plaintiff says that the said goods, chattels, and effects in the said declaration mentioned, at the said times when, &c., were not the goods, chattels, and effects of the said *P. C.* and *E. M.*, as assignees as aforesaid, in manner and form as the defendants have above alleged, but then were the goods, chattels, and effects of the said plaintiff, as in the said declaration mentioned, and this the plaintiff prays may be inquired of by the country, &c.

At the trial before *Park, J.* at the last assizes at *Warwick*, it was alleged that the plaintiff had made a *bonâ fide* purchase of the goods in question of *Metcalfe*. It appeared on the cross examination of the plaintiff's witnesses, that the sale had taken place immediately before *Metcalfe's* bankruptcy, under circumstances which raised a strong suspicion that it was fraudulent and colourable; and without hearing any evidence on behalf of the defendants, the learned judge left the case to the jury, and among other questions, he asked them whether they were satisfied that the sale was fraudulent, and whether the plaintiff was a party to the fraud; the jury answered the questions in the affirmative, and gave a verdict for the defendants. In *Michaelmas Term* last, *Hill* obtained a rule to set aside the verdict, and for a new trial, upon the ground that the plaintiff had shewn sufficient title to the goods, to entitle him to recover in the action.

Goulburn, Serjt., Humfrey, and Mellor, now shewed cause.—It was clearly proved that the plaintiff was a participator in the fraud of *Metcalfe*, the bankrupt; and this was expressly found by the jury. It is possible that the plaintiff might have relied on a mere naked possession of the property, but he having attempted to shew that the sale by *Metcalfe* was *bonâ fide*, he was bound by the evidence which he produced. *Sherriff v. Cadell (a)*, is in point. That was an action of trover for a ship, and the plaintiff, to prove his title, produced the ship's register, but being unable to prove the due execution of an assignment of it to himself, he attempted to rely on his mere possessory title, by calling witnesses to prove the payment of various sums for repairs, &c.; but Lord *Kenyon* ruled, that "the plaintiff having opened his case, and

attempted to go into evidence of property through the medium of written evidence, which evidence, too, had in some measure proved a title out of him, he should not then be allowed to give parol evidence to establish his title." So here, the plaintiff having once attempted to shew that he made a *bonâ fide* purchase of the goods, he could not afterwards fall back upon a mere naked possession, as being sufficient to entitle him to recover in the action. The issues upon the traverse of property and upon the special plea, are identical, but in the replication to the special plea, all the proceedings under *Metcalf's* bankruptcy are admitted, and the only question which arises upon that plea, is the identity of the goods. The plaintiff was obliged to deduce a title from *Metcalf*, and there was therefore sufficient ground to satisfy the jury as to that question.

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Hill and *Amos*, in support of the rule.—*Sherriff v. Cadell* (b), is not in point. That was an action of trover, to sustain which, the plaintiff must shew that he had a complete property in the chattel. Nor was it shewn at the trial that the defendants had any property in the goods, which is another very important distinction between that case and the present, for no evidence was offered to prove the defendant's special plea. And if *Metcalf's* bankruptcy was not proved, it must be taken never to have existed. The plaintiff shewed that he was in possession of the goods, and the defendants did not establish that they had any title to them. To sustain trespass, an actual exclusive possession is sufficient, as against a wrong doer, without regard to the title of the possessor (c). And where possession is proved, the property will be presumed to accompany it, until title be shewn in another person, *Chambers v. Donaldson* (d). And here the plaintiff's possession of the house was admitted. If the plaintiff had gone on to prove the proceedings under *Metcalf's* bankruptcy, then it might be said that the defendants' title was established, but this was not done, and therefore the *primâ facie* possession of the plaintiff ought to have prevailed. It is submitted that the proceedings in bankruptcy are not admitted by the replication. Before the new rules of pleading, the defendants would have been enabled to give evidence of their title, under the plea of the general issue, *Argent v. Durrant* (e). But now, the denial of the plaintiff's property in the goods, must be specially pleaded (f). The plea setting out the bankruptcy is very ingeniously drawn, but the Court will not permit the use of pleadings which are so vague as to deceive the other side.

TINDAL, C. J.—This is an action of trespass for breaking and entering the plaintiff's house and taking his goods. As to the breaking and entering, the defendants suffer judgment to go by default; but as to the taking of the goods, the general issue and two other pleas are pleaded.—[His Lordship here read the pleas as already stated.]—Now in answer to these pleas, the plaintiff replies, that the goods are the goods of the plaintiff. It is to be remarked that the third plea states several distinct facts, all shewing a title in the assignees under the bankruptcy, but by the replication, the issue is taken upon one single fact, namely, whether the property taken was property

(b) 2 Esp. N. P. C. 616.

(c) 2 Stark. Ev. p. 893, 9th ed.

(d) 11 East, 78.

(e) 3 T. R. 404

(f) Reg. gen. Hil. T. 4 Wm. 4, V. 3.

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belonging to the plaintiff. It was competent for the plaintiff to have put all the allegations in the plea in issue, by one denial, with the exception of that part which could be proved by matter of record, *viz.* the commission of bankruptcy. Nothing is more common than an action for trespass, where the defendant justifies under a judgment against *B.*, and in the plea the *fi. fa.* and warrant are set out; and if the plaintiff should join issue upon an allegation that the goods taken were not the goods of *B.*, it could not be said that any other question was at issue. Now what was the real question to be tried? The plaintiff might have insisted that the goods taken were his property; or he might have denied the identity of the goods, by shewing that the bankrupt had never exercised any control over him. All such circumstances as these, might have been proved to support the issue which was joined. Or the plaintiff might have shewn, although that is carrying his right to the fullest extent, that these were originally the goods of the bankrupt, but that the assignees had so long allowed him to remain in the possession of them, exercising full apparent control over them in the course of his trading, that they were estopped from saying that the assignment to the plaintiff could be objected to. But no evidence of this kind was given; it appeared that it was a mere pretended sale of the goods between the parties, and I see no ground for disturbing the verdict.

PARK, J.—The question is, what was the issue to be tried under these pleadings; and I agree with my Lord, that the only question was, whether these goods were the plaintiff's goods or not. With regard to the merits of the case, I never witnessed a more infamous attempt to set up a title to property.

VAUGHAN, J.—I am of the same opinion. The only part of the case upon which I had any doubt was, how far the pleadings were affected by the new rules of pleading, but I think, upon consideration, that they do not make any difference in the case. The plaintiff might have traversed all the facts in the plea, but instead of doing so, he says, the goods are mine. Nobody controverts the proposition, that possession of property is good *prima facie* evidence of title.

BOSANQUET, J.—I am of opinion, for the reason already given, that this rule ought to be discharged. I think that the proceedings in the bankruptcy were admitted by the replication, and the sole question at issue was, whether the goods in question were the property of the assignees or of the plaintiff.

Rule discharged.

Jan. 30th.

BRYDGES v. FISHER.

Where a commission issued at the instance of the defendant, for the examination of a witness who was abroad, under Stat. 1 Wm. 4, c. 22, sec. 3, and the defendant obtained a verdict. *Held*, that he is not entitled to the costs of the commission.

ADAMS, Serjt., had obtained a rule, calling upon the plaintiff to shew cause why the defendant should not be allowed, in his taxation of costs, the expense of a commission, which had been issued under the provisions of Stat. 1 Wm. 4, c. 22.

The plaintiff, Sir John Brydges, and one Macdonald, were commissioners

under Stat. 1 Wm. 4, c. 22, sec. 3, and the defendant obtained a verdict. *Held*, that he is not entitled to the costs of the commission.

appointed for the distribution of certain prize-money. *Macdonald* was then an army agent, and the defendant was his confidential clerk, and by the mutual desire of the plaintiff and *Macdonald*, the defendant was intrusted with the power to draw checks for the payment of the prize-money. *Macdonald* subsequently became a bankrupt, and it appeared that certain sums had been drawn out of the prize-money fund, by the defendant, which were not appropriated for the objects of the fund. The plaintiff then commenced an action against the defendant, to recover the money so misappropriated. The defendant set up as a defence to the action, that he was acting as clerk to *Macdonald*, and that the money had been paid according to his directions. Before the cause came on for trial, the defendant applied for and obtained a commission to examine *Macdonald*, who was residing abroad, in pursuance of the Stat. 1 Wm. 4, c. 22. At the trial, the jury found a verdict for the defendant; but the examination of *Macdonald* was not offered in evidence.

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Wilde, Serjt., and Sir *John Claridge*, shewed cause for the plaintiff. This application is founded upon Stat. 1 Wm. 4, c. 22, sec. 3, which directs, "that the costs of every writ or commission, to be issued under the authority of the said recited act (a), or of the power hereinbefore given by this act, in any action at law depending in either of the said courts at *Westminster*, and of the proceedings thereon, shall be in the discretion of the Court issuing the same." This commission was unnecessary, for *Macdonald* was not admissible as a witness. When the commission was granted, nothing was decided as to the competency of the witness. The witness did not leave this country until some time after the action was commenced; and if the defendant afterwards desired to avail himself of his evidence, it is submitted that it ought to be at his own expense.

Adams, Serjt., and *Nickol*, in support of the rule, contended that the witness was admissible; if he was not, the plaintiff was bound to make the objection when the commission was applied for. At all events, the defendant could have released him if it had been necessary, and then his deposition would have been received. This was a proceeding of extreme hardship against the defendant, and it was absolutely necessary, for his defence, that *Macdonald's* evidence should be obtained. There was no pretence for alleging that the defendant had taken any part of the fund for his own purposes. The only cases which have been decided upon a question like the present were under the 13 Geo. 3, c. 63.—[*Tindal*, C. J.—Under that act the party applying for the commission always paid the costs of it.]—In *Whytt v. McIntosh* (b), where a defendant had obtained a mandamus under that act, and the plaintiff gained a verdict, the Court allowed him the costs of cross-examining those witnesses.

TINDAL, C. J.—It is unnecessary to consider whether this witness would have been admissible at the trial or not, because the case may be decided entirely upon the discretionary power which is vested in the Court, as to the allowance of the costs of these commissions.

By the recital to the Stat. 1 Wm. 4, c. 22, it seems that the object which the

(a) Stat. 13 Geo. 3, c. 63.

(b) 9 Barn. & Cres. 316.

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legislature had in view, was to prevent the delay and expense to which parties were subjected when witnesses were residing abroad. Before that Statute, it was necessary that a party desiring to obtain the evidence of a witness who was abroad, should file a bill in equity craving a commission, and the cause was necessarily hung up until the commission was returned. It was therefore a very great boon to the subject, to be allowed in such a case, to take the summary mode of obtaining the evidence of the witness, which is pointed out in the Statute. The legislature, by sec. 3, has made the allowance of the costs to be in the discretion of the Court which issues the commission; and when we are called upon to exercise that discretion, the first point we should consider is, by whom the costs were paid before the Statute passed. Every body knows that the party who applied for the commission was compelled to pay the costs of it. Under the peculiar circumstances of this case, the defendant has obtained a very great advantage in obtaining the evidence of *Macdonald*, by means of the commission. The defendant had been his private clerk, and it seems clear that the money intrusted to the care of the defendant, had, in some way or another, come into the possession of *Macdonald*. It is certain that the evidence of this witness would, under these circumstances, have been received with the greatest possible distrust; and I am of opinion, that the defendant ought not to call upon the plaintiff to pay these costs.

PARK, J.—I give no opinion as to the admissibility of *Macdonald* as a witness. The third section of the Statute makes the costs of the writs issued, “under the authority of the act before recited, or of the power thereinbefore given,” to be in the discretion of the Court, and the *ninth* section refers to a distinct class of cases. Looking at the course of proceedings before this Statute was passed, I think this rule ought to be discharged. In the case of *Fairlie v. Parker* (c), the subject of the allowance of costs, under the Stat. 13 Geo. 3, was well considered, and there the costs were paid by the parties who obtained the commission, although they had obtained a verdict. In *Stevens v. Crichton* (d) the same rule was laid down by Lord *Ellenborough* who observed, that however desirable it was that the taxed costs should really indemnify the party who was ultimately found to be in the right, yet it was necessary to keep a check upon the very great expense to which this might lead, and to incur which the interest of unconscientious agents might afford a temptation

VAUGHAN, J.—I am of the same opinion. I think the defendant has derived a sufficient advantage by the issuing of the commission, to induce the Court to say that he ought to pay for it

BOSANQUET, J.—I think we shall exercise a sound discretion, by saying that the defendant ought not to recover those costs.

Rule discharged (e).

(c) 1 Moore & Payne, 446.
(d) 2 East, 259.

(e) *Taylor v. Royal Assurance Company*, 8 East, 323.

WEBB v. WEATHERBY.

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Jan. 28th.

DEMURRER.—The plaintiff, as assignee of one *Walter*, an insolvent, declared in assumpsit for goods sold and delivered by *Walter* to the defendant, with the usual money counts. Defendant pleaded the general issue, and as to 3*l.* 8*s.* 2*d.*, parcel of the said several sums in the said declaration mentioned, the defendant says, that the plaintiff ought not to have or maintain his aforesaid action against him, because he says, that, after the making of the said promise in the said declaration mentioned as to that sum, and before the said *George Walter* became such insolvent debtor, as in the said declaration mentioned, to wit, on the day and year in the said declaration mentioned, he, the defendant, paid to the said *George Walter* the said sum of 3*l.* 8*s.* 2*d.*, in full satisfaction and discharge of the said promise by him, the defendant, made in respect of the said sum of 3*l.* 8*s.* 2*d.*, parcel of the said several sums of money in the said declaration mentioned, and of the damages sustained by the said *George Walter*, by reason of the non-performance of the same promise as to that sum, and that the said *George Walter* accepted, had, and received of him, the defendant, the said sum of 3*l.* 8*s.* 2*d.*, in full satisfaction and discharge of the said promise in respect of the said sum of 3*l.* 8*s.* 2*d.*, and of the damage sustained by the said *George Walter*, by reason of the non-performance of the same promise, and this the defendant is ready to verify, &c.

In an action of assumpsit, where defendant pleaded accord and satisfaction, and the plaintiff replied, that the defendant did not pay the sum in satisfaction, nor did the plaintiff receive the said sum in satisfaction, *Held* upon demurrer, that the replication was not bad for multifariousness.

Replication to last plea.—The said plaintiff says, that the said defendant did not pay to the said *George Walter* the said sum of 3*l.* 8*s.* 2*d.*, in full satisfaction and discharge of the said promise by him, the said defendant, so made as aforesaid, in respect of the said sum of 3*l.* 8*s.* 2*d.*, parcel of the said several sums of money in the said declaration mentioned, and of the damages sustained by the said *George Walter*, by reason of the non-performance of the same promise as to that sum, nor did the said *George Walter* accept, have, and receive of him, the said defendant, the said sum of 3*l.* 8*s.* 2*d.*, in full satisfaction and discharge of the said promise, in respect of the said sum of 3*l.* 8*s.* 2*d.*, and of the damage sustained by the said *George Walter*, by reason of the non-performance of the same promise, in manner and form, as the said defendant hath in his said last plea in that behalf alleged, and this he, the said plaintiff, prays may be inquired of by the country, &c.

Demurrer.—And the defendant says, that the said replication of the plaintiff to the said plea of the defendant, by him above pleaded, is not sufficient in law; and for causes of demurrer, the defendant says, that the issue attempted to be raised by the said replication is multifarious and complex, inasmuch as the said replication not merely denies that the defendant paid the said *George Walter* the said sum of 3*l.* 8*s.* 2*d.*, but also that the said *George Walter* accepted, had, and received the same of the defendant, in full satisfaction and discharge of the said promise as to the said sum of 3*l.* 8*s.* 2*d.*, and of the damage sustained by the said *George Walter*, by reason of the nonperformance of the same promise, both of which facts are material, and either of which would be sufficient to bar the plaintiff from maintaining his action against the defendant, and also for that both the said facts constitute two distinct and different propositions, and the said replication is in other respects uncertain and insufficient, &c.—*Joinder in demurrer.*

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Chandless, in support of the demurrer.—Two propositions are traversed in this case, which subjects the replication to the charge of multifariousness. This is an objection which must prevail, unless the two propositions in the plea can be considered in substance as identical, and it can therefore be maintained that a traverse of one or both would merely raise the same issue in fact. But both propositions are material, because a plea would be bad which omitted either. *Pain v. Masters* (a); *Drake v. Mitchell* (b). Three things are necessary to constitute a good accord and satisfaction. First, there must be an appropriation by the defendant; secondly, a handing over of the money to which the word payment in its more limited sense amounts; and thirdly, an appropriation by the plaintiff. Now, the handing over being the payment, the appropriation by the plaintiff may well exist without any appropriation by the defendant. It cannot be contended that this plea only amounts to a plea of payment, because a distinction has always been recognised in this form of action, between a plea in accord and satisfaction, and a plea of payment. If this demurrer should be overruled, the effect of it would be that pleas of accord and satisfaction would be entirely abolished.

Theobald, contra, contended that the plea amounted only to a plea of payment: he was stopped by the Court.

TINDAL, C. J.—When a party denies that he received a thing, he virtually denies that he received it in accord and satisfaction, and this has been held ever since the time of *Elizabeth*. It is recognised in 9 *Coke*, 80, b; and also in *Young v. Rudd* (c). Upon the authority of these cases, it seems to me that, in the present instance, the two propositions in the replication are substantially the same, and our judgment must be for the plaintiff.

The rest of the Court concurred.

Judgment for plaintiff.

(a) 1 Stra. 573.

(b) 3 East, 256.

(c) 5 Mod. 86.

Jan. 27th.

HODGES v. Earl of LITCHFIELD.

1. In an action for damages brought by vendee against vendor, for not making a good title to an estate, held that he is not entitled to recover for expenses incurred in negotiating the purchase, or for having the estate surveyed.

2. That he is entitled to recover charges incurred in investigating the title, including the searching for judgments, but not the costs of drawing and ingrossing a conveyance of the estate, the same having been prematurely prepared.

3. That the vendor having filed a bill in equity, against the vendee, for a specific performance of the contract, which was dismissed with costs, which were accordingly taxed and paid to the vendee by the vendor, held, that in the action for damages, the vendee could not recover his extra costs, beyond the taxed costs, which were incurred by him in defending the suit in equity.

4. That the vendee could not recover costs incurred by him in investigating the title to the estate, after the filing the bill in equity.

5. That the vendee is entitled to be paid at the rate of *five per cent.* for interest on his deposit-money, although the Court of Chancery had ordered payment at the rate of *four per cent.*

THIS was an action of assumpsit to recover from the defendant damages for the breach of a special contract, for the sale of an estate by the defendant to the plaintiff. The first count of the declaration stated that on the 7th Nov. 1828, the plaintiff agreed to purchase of the defendant a certain

estate for the sum of 21,500*l.*, of which 1500*l.* was then paid, and the remainder was to be paid on the 25th day of *March* then next, and if the payment should be delayed after that time, and such delay should be occasioned by the plaintiff, the plaintiff should pay lawful interest on his purchase money from thence until the payment, and should be entitled to the rents and profits of the premises from the said 25th day of *March*. And the said estate was declared to be subject to a certain modus in lieu of tithes. And it was thereby agreed, that an abstract of title should be ready for delivery to plaintiff on the 25th of *Dec.* then next, at Mr. *K.*'s office in *Stafford*, and if plaintiff should object to defendant's title, or require any act, matter, or thing, to be done, procured, or executed for the completion thereof, notice in writing of the particular objection or matter required, should be given to said Mr. *K.* on or before the 21st of *February* then next, or otherwise plaintiff should receive the same, and should be held to have accepted the title. And plaintiff saith that, although an abstract of the title of the said estate was delivered to plaintiff, and one *R. H. W. J.*, Esq. a conveyancing counsel did object to defendant's title, and require certain acts, matters, and things to be done, procured, and executed for the completion thereof, and although notice in writing of the particular objections was, on the 17th of *February*, 1829, given to the said Mr. *K.*, and although plaintiff was willing to complete the said purchase, on having a good title to the said estate, yet said defendant did not, on or before said 25th day of *March*, make a good title to the said estate, by reason whereof plaintiff hath been put to great charges, amounting to 1000*l.*, in and about, &c.—[These charges are set forth in the award of the arbitrator hereinafter mentioned. There were also other counts in the declaration, stating the damages as in the first.]—To this declaration the defendant pleaded the general issue, and at the trial before Sir *N. C. Tindal*, C. J., an order of *Nisi Prius* was made, that a verdict should be entered for the plaintiff, subject to the opinion of the Court of *Common Pleas*, after an award should have been made by *J. T. C.*, Esq. who was thereby empowered to ascertain and settle the amount which would be properly payable to the plaintiff, on each and every of the heads of claim stated in the declaration.—[The several heads of claim, with the finding of the arbitrator under each claim, were here set out; and the award was stated to have been duly made for a sum of 439*l.* 0*s.* 8*d.* (subject as aforesaid.)]—The question for the opinion of the Court is, whether the plaintiff should be at liberty to enter a verdict in his favour, and if so, whether for the said sum of 439*l.* 0*s.* 8*d.*, or for what other sum the same should be entered.

It was agreed that each claim should be separately discussed.

The *first claim* was for plaintiff's charges and expenses in and about negotiating and agreeing for the purchase of the estate, and having the same surveyed. The arbitrator's award upon this head was as follows. "That the sum of 6*l.* 11*s.* 8*d.* would be properly payable to the plaintiff, for his expenses in negotiating and agreeing for the said purchase, the sum of 4*l.* 9*s.* 8*d.*, parcel thereof, being expenses incurred by the plaintiff, with his own agent, in and about the said negotiation, and prior to the execution of the said articles, and that the sum of 10*l.* 10*s.* would be properly payable for the expense of having the estate surveyed."

Thesiger, for the plaintiff, submitted, that although these expenses were

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incurred before the execution of the contract, that the plaintiff was entitled to be repaid. Here the conditions of sale stated the estate to consist of a certain number of acres, and the plaintiff being desirous of ascertaining the correctness of the statement, caused the estate to be surveyed.

TINDAL, C J.—It appears to us that these expenses ought not to be allowed. As to the surveying, that should have been deferred until it was probable that the contract would be carried into effect.

Claim disallowed. 17*l.* 1*s.* 8*d.*

Second Claim.—For investigating the title to the said estate, and the existence and effect of a supposed modus, in lieu of tithes; and upon this head the arbitrator found as follows. "That the sum of 128*l.* 10*s.* 10*d.* would be properly payable in respect thereof, which said sum was composed of the following particulars: the sum of 87*l.* 1*s.* 10*d.* for the charges of a solicitor of the plaintiff, in such investigation, allowed on taxation. 7*l.* 12*s.* 6*d.* the expenses and coach hire of the said solicitor, in a journey to and from *Stafford*, relating to the same matter, and also allowed on taxation. 6*l.* 17*s.* 2*d.* the fees paid in searching for judgments and other incumbrances, which searches were made on the 27th *February*, 1829. 1*l.* 11*s.* 4*d.* fees paid in other necessary searches, and 25*l.* 8*s.* expended in fees to counsel; but of the said sum of 87*l.* 1*s.* 10*d.*, the said arbitrator did find that 6*l.* 17*s.* 2*d.* were for solicitor's charges in attending to make the searches first above-mentioned, and 16*l.* 9*s.* 4*d.* for solicitor's charges, in preparing the conveyances on the 27th *February*, 1829; and of the said sum of 25*l.* 8*s.*, the sum of 10*l.* 10*s.* was for counsel's fees in settling the same conveyances; and he did also find that the said sum of 87*l.* 1*s.* 10*d.*, the further sum of 10*l.* 18*s.* was for charges incurred after the date of the filing of the bill by the said defendant, to compel the specific performance thereafter mentioned."

Thesiger submitted that there could be no doubt but that the plaintiff was entitled to be paid the first part of these charges. The judgments were not searched for until the 27th of *February*, 1829, before any defect was discovered in the defendant's title. The title deeds of the estate were at *Stafford*; and in *Sugden's Vendors and Purchasers* (a), the rule is laid down, "The seller is bound to produce the deeds, in order that the abstract may be examined with them, although they are not in his possession, and the purchaser is not to be entitled to the custody of them. But if they are in the possession of a third person, the purchaser's solicitor, it seems, must send to the place where the deeds are, in order to examine them with the abstract, and the seller must pay the expense of the journey." As to the charges for preparing the conveyances, it must be abandoned, *Jarmain v. Egelstone* (b), being decisive, that if a conveyance is prepared after an objection is taken to the title, the intended purchaser cannot recover the expense from the vendor.

Talfourd, Serjt., contra.—The search for judgments was made too soon: the plaintiff should have waited until he had ascertained whether the title would be completed or not. At all events the plaintiff is not entitled to recover the 10*l.* 18*s.* incurred after the proceedings were taken in equity.

(a) Vol. 1, p. 449, 9th ed.

(b) 5 Carr & Payne, 172.

TINDAL, C. J.—It appears to me that these charges may be reasonably allowed, with the exception of the charge for preparing the conveyance, and the sum of 10*l.* 18*s.*, which was incurred after the defendant had filed a bill for a specific performance of the contract. The search for judgments ought to be made at a comparatively early period in the transaction, for by doing this, subsequent expense is frequently avoided.

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Claim allowed, deducting the said several sums of

£16	9	4
10	10	0
10	18	0

Third Claim.—For certain costs incurred by the plaintiff in and about his defence of and in a certain suit commenced by defendant against plaintiff in the Court of *Chancery*, for compelling a specific performance by said plaintiff of the said articles of agreement, and in which said suit the bill filed was dismissed. The arbitrator found, under this head of claim, “that the said bill was dismissed with costs, and that the plaintiff’s costs in defending himself against the said bill, were taxed as between party and party, and that the amount of such taxed costs had been duly paid to him, but that there remained the sum of 194*l.* 4*s.* 11*d.* which had been paid by him to his solicitors, for the extra charges of such defence, and by them *bonâ fide* disbursed, or reasonably charged as between solicitor and client, in the course of such defence, and the said arbitrator did find that the said sum of 194*l.* 4*s.* 11*d.* would be reasonably payable to the plaintiff under the third head.”

Thesiger, in support of this claim.—There are conflicting cases as to the right of recovering extra costs. In *Hathaway v. Barrow* (c), Sir *James Mansfield* held that the extra costs of a petition which the plaintiff was compelled to promote through the malfeasance of the defendant, were not recoverable; and in *Sinclair v. Eldred* (d), Lord *Mansfield* considered that in an action for a malicious arrest, the plaintiff could recover no damages for extra costs. On the other hand, in *Sandbach v. Thomas* (e), Lord *Ellenborough* held a contrary opinion, saying, “If by your act you subject a party to a legal liability to pay a sum to another, you must indemnify him against such expenses.” In *Webber v. Nicholas* (f), *Best*, C. J., considered himself bound by the case of *Sinclair v. Eldred*, but said his own opinion was in unison with that of Lord *Ellenborough*. In *Jenkins v. Biddulph* (g), the same question, came before this Court, and it was held that in an action for a false return, extra costs incurred in setting aside an outlawry, could not be recovered; but there, neither Lord *Ellenborough*’s decision, or the opinion of *Best*, C. J., was referred to. In the Appendix to *Sugden’s Vendors & Purchasers*, a case, *Jones v. Dyke* (h), is mentioned, and there it appeared that in a case somewhat like the present, the plaintiff was allowed 30*l.*, the costs of a bill in equity which he had filed.—[*Tindal*, C. J.—Was that before these cases were decided?—It does not appear when that cause was tried, but from one

(c) 1 Camp. N. P. C. 151.

(d) 4 Taunt. 7.

(e) 1 Stark. N. P. C. 307.

(f) 1 Ryan & Moody, 420.

(g) 4 Bing. 160.

(h) Appendix, vol. 2, 319, No. viii. 9th ed.

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of the items it must have been since 1807.—[*Bosanquet, J.*—There are two cases, *Hopkins v. Grazebrook* (i), and *Walker v. Moore* (j), relating to the damages which a plaintiff is entitled to recover when a purchase is not completed.]—Those cases are not in point with the present. Although the plaintiff recovered his costs against the defendant, when the defendant's bill was dismissed, his extra costs are yet unpaid, and it may be contended that the defence of the suit in equity was a mode adopted by the plaintiff of investigating the defendant's title to the estate.

Talfourd, Serjt., contra, was stopped by the Court.

TINDAL, C. J.—The plaintiff is entitled to recover from the defendant any expenses which he was necessarily put to, in investigating the defendant's title to the estate; but here the defendant filed a bill in equity against the plaintiff, for a specific performance of the contract of sale, and that is one degree removed from the costs which were incurred in the ordinary course of the transaction. The vendor, thinking he had a good title to the estate, took a remedy against the defendant, which the law had provided, but when he failed in that suit, the plaintiff was in the same situation as any other person against whom an action has been brought.

PARK, J., and VAUGHAN, J., concurred.

BOSANQUET, J.—The plaintiff has received his compensation, by being paid the costs which have already been taxed in equity.

Claim disallowed, 194*l.* 4*s.* 11*d.*

Fourth Claim.—For making and performing divers journeys, and otherwise respecting the purchase of the estate. The arbitrator found, "that in the course of negotiation for and about the said purchase, and of the defence of the said plaintiff in the said suit, it became reasonable and prudent for the said plaintiff to take certain journeys, and to incur certain expenses, and that the sum of 45*l.* would be properly payable to the said plaintiff in respect thereof."

Thesiger endeavoured to draw a distinction between this claim and that which formed the subject of the last-mentioned claim.

TINDAL, C. J.—We have already held, that the plaintiff is not entitled to recover the extra costs incurred in the suit in Chancery, and *a multo fortiori* he cannot recover the expenses incurred in making preparations for his defence to that suit.

Claim disallowed, 45*l.*

Fifth Claim.—The plaintiff's loss, by being deprived of the gains and profits he might have made from using the 1500*l.*, mentioned in the declaration. The arbitrator upon this head submitted to the Court, "that upon the dismissal of the defendant's bill in equity, with costs, the deposit of 1500*l.*, theretofore advanced by the said plaintiff, was ordered to be returned, and

(i) 6 Barn. & Cres. 32.

(j) 10 Barn. & Cres. 416.

that the plaintiff thereupon applied to the Court of Equity for an order for the allowance of interest thereon, and that an order was made, and has been performed, for the payment of interest, at the rate of 4l. per cent., from the 7th day of *November*, 1828, to the 23d day of *June*, 1832, when the said deposit was returned; and if the said Court of *Common Pleas*. should be of opinion that the said plaintiff was entitled to recover any further compensation for the loss of the use of the said 1500*l.* during the period last mentioned, then the said arbitrator did find that the sum of 54*l.* 3*s.* 3*d.* would be properly payable to him in that behalf."

TINDAL, C. J.—We think this claim for interest, at 5 per cent., ought to be allowed.

Claim allowed, 54*l.* 3*s.* 3*d.*

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CASE for obstructing the navigation of a stream. The *First* count described the stream as a public navigable stream, which the defendants obstructed. The *Second* count stated that the plaintiff was lawfully possessed of a certain close of land, and by reason thereof the said plaintiff ought to have had, and still of right ought to have a certain way from the said last close unto and along a certain stream or watercourse, unto and into a certain public navigable river, called the River *Nene*, and so back again from the same river unto and along the said stream or watercourse, and from thence into the said close, for himself and his servants to go, return, pass and repass in boats every year and at all times of the year, at his and their free will and pleasure. Yet the said defendants well knowing the said premises, but contriving and wrongfully and unjustly intending to injure and prejudice the said plaintiff in this respect, and to deprive him of the use and benefit of his said way, to wit, on, &c., wrongfully and injuriously obstructed the said way, by means whereof the said plaintiff could not, during the time last aforesaid, nor can he have or enjoy his said way, as he of right ought to have done; and whereby also the said plaintiff hath been and still is hindered from enjoying and occupying his said close in so full and beneficial a manner as he otherwise would and of right ought to have done.

Plea. The general issue.—*Not guilty.*

The cause was tried at the *Northamptonshire* summer assizes, before Mr. Justice *Taunton*. It appeared that the plaintiff's premises were situate at the extreme end of a drain or watercourse, which communicated with the River *Nene*, and it was proved that the owners of the plaintiff's close were entitled to a right of navigation for boats and barges, upon the said watercourse, which had been used within 20 years. The defendants' premises were situate about midway between the extremity of the watercourse and the River *Nene*, and it appeared, that they had erected, upon their own premises, a bridge and tunnel across the navigation, so as to obstruct the passage of any boat or barge beyond the bridge. It was proved that there was so great an accumulation of mud beyond the bridge, that a boat could not have passed on that part of the watercourse, if the bridge and tunnel had been removed, and no user of that part of the way could be established, later than 16 years before the action was brought, the mud (which the plaintiff

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1. Where plaintiff had a right of way in a navigation, which, through his own neglect, was incapable of use from a certain point, and defendant erected an obstruction immediately below that point, *Held*, that although the defendant's act caused but a very small prevention of the exercise of the plaintiff's right, that an action on the case could be maintained.

2. Although the erection of an obstruction causes no immediate injury to the plaintiff in his use of a right of way (in consequence of his own laches), yet if its existence puts his title into hazard, and prevents him from exercising his right whenever he thinks fit to resume it, *Held*, that an action on the case may be maintained.

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might have cleared away) having gradually accumulated during that period. The learned judge told the jury that if they were satisfied that the plaintiff was prevented by the accumulation of the mud, from using the navigation, before the bridge and tunnel were erected, the defendants were entitled to a verdict. Verdict for defendants. A rule having been obtained by *Adams, Serjt.*, to set aside the verdict, and for a new trial,

Hill and Miller shewed cause.—This was no obstruction to the plaintiff's right of way. The jury found by their verdict that the drain was so choked up with mud, beyond the bridge and tunnel, that the plaintiff could not have passed upon it with a boat or barge, if no bridge had been built. The plaintiff had suffered this mud to collect upon his own land, and as the premises on the other side of the dyke belonged to the defendants, they built the bridge for the sake of a more convenient passage. If the plaintiff had shewn any disposition to clear away the obstructions in the navigation, for the purpose of using the easement which he was entitled to, the defendants could have removed the bridge. Subject to the easement to which the plaintiff was entitled, the defendants were justified in putting what erections they pleased upon their own premises. They might have erected flood-gates, or any temporary bridge, provided they did not obstruct the plaintiff in his use of the navigation. So, in the present instance, the plaintiff was not interrupted by the obstruction, because he was unable to use the passage by reason of his own neglect in not clearing out the navigation, which he was bound to do. In *Baxter v. Taylor* (a), it was held that a reversion could not maintain an action on the case against a stranger for exercising an alleged right of way; such an act not being necessarily injurious.—[*Tindal, C. J.*—That is because the user of the way, during the tenancy, would be no evidence against the reversioner.]—The plaintiff was bound to shew that the injury he complained of arose by the act complained of in the declaration, *Hewitt v. Melton* (b); and here the plaintiff avers that the defendants obstructed the way, whereas the evidence proved that the way was obstructed by natural causes before the bridge was built.

Adams, Serjt., and *Humfrey, contra.*—There cannot be any doubt that if the mud beyond the bridge had been cleared out by plaintiff, the present action could have been maintained. But it is not necessary that actual damage should be proved to have been sustained. In *Williams v. Morland* (c), Mr. Justice *Littledale* says, "It is true that in trespass for a wrongful entry into the land of another, a damage is presumed to have been sustained, though no pecuniary damage be actually proved. So in the case of an action for the obstruction of a right of common or a right of way, any obstruction of that right is a sufficient cause of action." *Mason v. Hill* (d), was an action brought for diverting water from the plaintiff's mill, and in the course of the judgment which was given in that important case, the following passage occurs: "Whether the plaintiff could have maintained an action before he had constructed his mill, or applied the water of the stream to some profitable purpose, we need not decide. It may, however, be proper to refer to two cases not cited in the argument. In *Palmer*

(a) 4 Barn. & Adol. 72.

(b) 1 Crom. Meeson & Ros. 240.

(c) 2 Barn. & Cres. 916.

(d) 5 Barn. & Ado. 26.

v. Koblethwaite, 1 *Show.* 64, the declaration merely stated that the water used and ought to run to the plaintiff's mill, and Lord *Holt* said, 'Suppose a watercourse runs to my ground and I have no use for it, and one upon another ground divert it before it comes to mine, will an action lie? Is not this the same? Must you not lay some use for it?' But you will speak to it again. In the report of the same case in *Skinner*, 65, *Pollexfen*, in argument, said, he took it to be a clear case that the stream, being the plaintiff's, the defendant could not divert it; and so held the Court, that an action had lain for diverting the stream though no mill had been erected. The final result of that case does not appear in the Books, and the Roll has been searched for in vain. In *Glynne v. Nicholas*, 2 *Show.* 507, a similar question was raised, which appears from the Report of the same case in *Comberbatch*, 43, to have been decided for the plaintiff."—[*Tindal*, C. J.—Suppose, as is often the case, that a stream over which there is a right of navigation, becomes shallow by the dryness of the season, do you say that an action could be maintained if an obstruction is put on the bed of the river whilst it was impossible that the way could be used?—The distinction is, that in such a case the party who had a right of navigation, could not help himself, if there was a want of water in the channel, but here the plaintiff, by cleansing the navigation, could immediately avail himself of the right. He is capable of making it useful by his own act. Another point which may be contended for the plaintiff is, that the erection of the bridge by the defendants would hereafter prove injurious to the plaintiff's title. It would be evidence to prove a non user of the right of way over the navigation. *Patrick v. Greenway*(e), is in point. That was an action of trespass for fishing in the plaintiff's several fishery; it appeared in evidence that the defendant fished there, but did not take any fish, neither was it alleged in the declaration that the defendant caught any fish; the plaintiff obtained a verdict, which in the following term the defendant moved to set aside; but this Court refused even a rule to shew cause, upon the ground, that the act of fishing was not only an infringement of the plaintiff's right, but would hereafter be evidence of an using and exercising of the right by the defendant, if such an act were overlooked.—[*Tindal*, C. J.—There is a case, *Pindar v. Wadsworth*(f), where the smallness of the damage sustained by a commoner was held to be no ground for a nonsuit.]

Cur. adv. vult.

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TINDAL, C. J.—This question comes before us on a motion for a rule Jan. 31st. to set aside a verdict, entered for the defendant by the direction of the learned judge.—The plaintiff declared in case, stating in his declaration that he was possessed of a close, and entitled to a right of way from the said close along a certain drain or watercourse unto and into a public navigable river, called the *Nene*, and so back again for himself and his servants to go, return, pass and repass in boats, at their free will and pleasure; and the plaintiff then assigns as a gravamen, that the defendants knowing the premises, wrongfully and injuriously obstructed the said way, by means whereof the plaintiff could not enjoy it as of right he ought to do.

At the trial, the jury, in answer to a question proposed to them by the learned judge, found "that the passage was obstructed before the erection of the bridge and tunnel by the defendants" (which was the act complained

(e) 1 Williams Saund. 346. n. (b).

(f) 2 East, 154.

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of), "so that the plaintiff could not have the use of it." And upon this the learned judge directed the verdict to be found for the defendants.

It appeared upon the evidence, that the plaintiff's close and premises were at the further end of the drain or watercourse, and that the defendants' premises, upon which the obstruction was erected, were situated between the plaintiff's premises and the River *Nene*; and it further appeared that the accumulation of mud in the drain, between the plaintiff's close and the defendants' premises, had been so great, and was so great at the time of the erection of the bridge and tunnel by the defendants, that for the last 16 years no barge could navigate or pass along that part of the drain or watercourse; and that the defendants had erected the bridge and tunnel across the drain, upon their own premises, just below the accumulation of mud, so as to render any passage through the bridge and tunnel, even if the mud had been removed, altogether impracticable. The question raised before us has been, whether, in this state of circumstances, there was such an obstruction of the right of passing along the watercourse, as can form the ground of an action against the defendants. But we think the right to the verdict in this case may be decided upon a narrower ground. The right of navigating through the drain or watercourse, from the plaintiff's close to the *Nene* and back again, is equally a right to navigate through the drain from the River *Nene* to the plaintiff's close, and back again. And upon the evidence, it appears, that if the plaintiff should endeavour to pass with a boat or barge from the River *Nene* to his premises, he would be prevented by the defendant's erection from even arriving so far up the drain, as to reach the impediment created by the mud. The plaintiff therefore, would, in the strictest construction of the words in the declaration, "be prevented, by the defendant's obstruction, from enjoying his way as he of right ought to do," for he could not get so near his premises, as but for the erection of the bridge and tunnel he might have done. And although this would in effect be but a very small prevention of the exercise of his right, yet it is the principle upon which we are to decide, and not the peculiar state of facts which apply to the present case; for if the obstruction had been at the very mouth of the drain, and the accumulation of mud had commenced several miles up, and close to the plaintiff's close, the same argument would have applied, in which case it is obvious that the damage to the plaintiff, by such an intervening obstruction, might have been very great.

Upon these grounds, therefore, we think the case must go down to another jury.

But independently of this narrower ground of decision, we think the erection of the tunnel is in the nature of (and until it is removed is to be considered as) a permanent obstruction to the plaintiff's right, and therefore an injury to the plaintiff, even though he receives no immediate damage thereby. The right of the plaintiff to this way is injured, if there is an obstruction, in its nature permanent. If acquiesced in for 20 years, it would become evidence of a renunciation and abandonment of the right of way. That is the ground upon which a reversioner is allowed to try his action for an obstruction, apparently permanent, to lights and other easements which belong to the premises. *Jesser v. Gifford* (g). The plaintiff's premises would sell for less while the obstruction is in existence, if now put up to

sale; and, indeed, there seems no legal ground upon which the facts relied upon by the defendants can constitute an answer to the charge upon the record. As a plea of denial of the charge, they would not support it, for the tunnel was erected by the defendants, and the erection is such as effectually to prevent barges from passing through it, whether they can come up to it or not. Again, if put upon the record as a plea in bar, they would amount to a confession of the charge, without being an avoidance; for it is no excuse to the defendants that the plaintiff has voluntarily suffered an accretion of the mud, which he might remove at any time when he thought fit. The voluntary suspension by the plaintiff of his exercise and enjoyment of a right, can form no justification to the defendants for preventing him from the possibility of enjoying it.

Upon the mere general ground, therefore, that the erection of the bridge and tunnel is an immediate injury to the plaintiff, by putting his right into hazard, and by preventing the actual enjoyment of it whenever he thinks fit to resume it, independently of the narrower ground upon which we first relied, we think this action maintainable, and that the rule for a new trial must be made absolute..

Rule absolute.

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THIS was an action of *assumpsit* upon the policy of insurance, hereinafter mentioned, which had been subscribed by the defendant for 200*l*. The defendant pleaded the general issue, and upon the trial at *Guildhall*, before *Tindal, C. J.*, at the sittings after *Hilary Term, 1834*, the jury found a verdict for the plaintiff for the sum of 27*l*. 15*s*. 6*d*., subject to the opinion of the Court on the following Case.

The policy on which the action was brought was effected by *Devaux* and Co., as agents for the plaintiff, through the intervention of *Mr. Jeray*, on goods per *The Roxelane*, or ship or ships, at and from (among other parts or places in the *Pacific Ocean*) *Valparaiso*, to any port or ports in *France*, and the United Kingdom of *Great Britain*, with leave to call, touch, and trade, at any port or ports, place or places, bays, rivers, and settlements, in *America*, or any where else, with leave to effect all transshipments, and including the risk of craft, to and from the vessel or vessels. The usual perils were insured against, and the policy, which was for 7000*l*., had the following memoranda subscribed. N. B. Corn, fish, salt, fruit, flour, and seed, are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average under 5*l*. per cent. and all other goods. Also the ship and freight are warranted free of average under 3 per cent., unless general, or the ship be stranded. This policy, with another for 140*l*. 13*s*., No. 59, dated 23 *January, 1830*, being together 7140*l*. 13*s*., is hereby declared to be on goods, specie, or

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1. By a policy of insurance certain hides were insured from the usual perils, "free of particular average, unless the ship be stranded." In the course of the voyage the hides were so much damaged by salt water, that they were necessarily sold, and the ship proceeded on her voyage homewards, and was stranded. Held, that the rights of the assured and underwriters were fixed and determined, at the time of the sale of the hides, and that the subsequent stranding of the vessel, did not satisfy the condition upon which the warranty depended.

2. Where, by the terms of the policy, the underwriter was not answerable for an average loss upon certain hides insured, and in the course of the voyage the hides became so damaged by one of the perils insured against, that they could not have been carried to the place of their destination (in consequence of their state of putridity) whereupon the hides were sold at the nearest port. Held, that it amounted to a constructive total loss.

3. Where the hides were sold in the state and under the circumstances above mentioned, Held, that notice of abandonment was necessary, to enable the assured to maintain an action for a total loss.

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bullion, as interest may appear per bills of lading, specifying that the shipment applies to insurance of 7140*l.* 13*s.* To pay average on each species of goods by following landing numbers of the value of 100*l.* each, as if separately insured: *cocoa and hides free of particular average, unless the ship be stranded.* In case of average on the hides, the assurers are to pay the expense of washing and drying the hides in full. The defendant's subscription for 200*l.* was admitted.

The plaintiff, on the 6th *May*, 1831, caused to be shipped on board the said ship *Roxelane*, at *Valparaiso*, in the *Pacific*, for *Bordeaux*, in *France*, 1000 salted hides, marked + of the value of 1117*l.*, his property; which hides were intended to be insured by the said policy, and were duly declared thereupon, and a bill of lading duly signed by the Captain *Superville*, in the ordinary form; 5928 other hides were also shipped on board the same vessel, for the same voyage. The *Roxelane* being sea worthy, and having the said 1000 hides and other hides on board, departed on her voyage from *Valparaiso*, on 13th *May*, 1831, for *Bordeaux*, and on the 5th *June*, 1831, in the course of her voyage, met with bad weather and sprung a leak, in consequence of which, on the 28th *June*, 1831, it was found absolutely necessary, for the safety of the ship and cargo, to put into a port, and the ship was accordingly taken into *Rio de Janeiro*, in *Brazil*, being the nearest convenient port, for repair, where she arrived on 7th *July*, 1831.

The whole of the cargo was there landed, the 1000 hides were sold for the gross sum of 273*l.*, under the circumstances stated in evidence hereinafter set forth, which was taken at *Rio de Janeiro* on interrogatories.

The said ship *Roxelane* being repaired and the leak stopped, which was in the bottom, she on the 3rd *October*, 1831, sailed from *Rio de Janeiro*, without the said 1000 hides, but with such part of her cargo as had not been sold, which was again reloaded on her voyage to *Bordeaux*, and in the course of the voyage from *Rio de Janeiro* to *Bordeaux* the ship was stranded at the entrance of the river *Garonne*, on the 29th *December*, 1831.

The rest of the cargo so reloaded, as aforesaid, was delivered without damage at *Bordeaux*. The declaration is to be taken as part of the case, and under the facts already stated, and, on the evidence detailed, the only question to be decided is, whether the underwriter is liable to the loss on the hides; if the Court should be of that opinion, the verdict is to stand for 27*l.* 15*s.* 6*d.*, being 88*l.* 14*s.* 4*d.* per cent. on the sum of 1117*l.*, the value of the 1000 hides; if not, a nonsuit to be entered.

The evidence stated that the hides were very much damaged by the salt water, and were in a state of putrefaction, and that if they had been re-shipped for *Bordeaux*, they could not have arrived there, as they must have been thrown overboard during the voyage.

No notice of abandonment was given.

The case was argued in *Trinity Term* last, and again upon the third point as to the necessity of an abandonment, by *Maule*, for the plaintiff, and *Cole-ridge*, Serjt., for the defendant, in this present *Hilary Term*. The arguments and principal cases cited, are fully considered in the judgment.

Cur. adv. vult.

that he is entitled to recover, either for an average loss on the hides, upon the ground that there has been a stranding of the ship, within the meaning of the policy, so that the warranty as to the hides being free from a particular average, may be considered as altogether struck out of the policy; or for a total loss, with benefit of salvage to the underwriters, on the ground that the loss is in its nature total. The defendant, on the other hand, contends, that the loss proved at the trial is an average loss only, and that the stranding of the ship, under the circumstances, and at the time stated in the case, cannot have the effect of opening the warranty. And the defendant further contends, that even if the loss is to be construed as a total loss, the plaintiff cannot recover it, for want of an abandonment. The three questions, therefore, which have been discussed upon argument before us are these:

First, whether there has been such a stranding of the ship, as to entitle the assured to claim and recover an average loss:

Secondly, if no such stranding has taken place, then, whether the loss can be considered to be a total loss:

Thirdly, admitting the loss to be total, whether an abandonment was necessary, in order to enable the plaintiff to recover; and upon these three points we proceed to give the opinion at which we have arrived.

The facts which relate to the stranding of the ship are shortly these. The hides in question were shipped on board the *Rozelane*, at *Valparaiso*, for *Bourdeaux*, in *France*. The ship sailed from *Valparaiso* on the voyage, insured, on the 13th of *May*, 1831, and was taken into *Rio*, in consequence of stress of weather, on the 7th of *July*. The hides insured were sold at *Rio*, the sale being necessary for the benefit of all concerned, and after the sale, the ship being repaired, departed on the 3d of *October*, on her voyage to *Bourdeaux*, not having any part of the hides insured on board, and was stranded at the entrance of the *Garonne*, on the 29th of *December* following. The stranding of the ship, therefore, took place during the voyage which was described in the policy, but not until after the hides had been landed, and after the whole of the assured's adventure, and the whole of the risk of the underwriters upon the hides—that is, in effect, after the whole of the voyage insured, had been determined and ended by the act of the assured. And under these circumstances, we think there is neither principle nor authority upon which it can be held, that the subsequent stranding of the ship, satisfies the condition upon which the warranty in the policy depends. The general principle laid down in *Burnett v. Kensington* (a) is, that if the ship be stranded, the insurer is liable for an average damage: the policy after the stranding must be construed as if no such warranty had been written on the face of it. But the question is, within what limits of time a stranding must take place in order to produce such effect? Now, every other clause in the policy relates to the voyage insured, and to that alone. The liability of underwriters on goods commences with the putting them on board, and ceases upon their being discharged and safely landed, or with any other legal determination of the adventure. The clause in question therefore, as it appears to us, ought to be construed with the same restriction, and the stranding, which is made the condition of letting in an average loss, ought, upon the ordinary rules of construction, to be construed to mean a stranding

(a) 7 Term Rep. 210.

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which takes place after the adventure has commenced, and before it has terminated. If the ship should be stranded (according to the legal construction of that word) in the harbour where she was lying for the purpose of receiving the goods, but before she takes the goods on board, that is, before the policy attaches, or the adventure commences, and after the loading the ship should sail, and an average loss be sustained, it would surely be unreasonable to contend that the exception or condition of the warranty should have an operation before the policy, that is, the warranty itself, has attached; and a much greater difficulty opposes itself to the position, that the stranding, after the policy is at an end, shall have any operation on the clause of warranty. Indeed, there is no more reason why a stranding which takes place in a part of the voyage described in the policy (but at a time subsequent to the termination of the risk on the policy) should affect the question, than a stranding upon a subsequent voyage, altogether distinct from that mentioned in the policy. Again, the rights of the parties, the assured and the underwriters, were fixed and determined at the time of the sale at *Rio*. The loss was then either a total loss, with benefit of salvage, or an average loss; there is an end of any contingency, because the voyage is over which is the subject of risk. We therefore think it would be a forced construction of the policy, not consistent with the ordinary rules of interpretation, and certainly not sanctioned by any decided cases, to hold that the stranding in the *Garonne*, in the month of *December*, can affect the nature of the loss upon hides which were unshipped and sold in the course of the voyage in the *July* preceding.

As to the second question, whether the loss upon the hides is a total loss, we are all of opinion, that upon the evidence stated in the case, the loss is a constructive total loss. For we take the necessary inference to be drawn from that evidence to be, that in consequence of damage from perils of the sea (one of the perils insured against), it became impracticable to carry the hides, in specie, to the termination of the voyage for which they were insured; and that if it had been possible to have taken them to *Bordeaux*, they would have arrived in a state of putridity, having altogether lost the character of hides. We do not hold the loss to be total, upon the ground that the hides, if carried to *Bordeaux*, would have arrived in so bad a state that they would have sold for less than the freight and expenses, or would have been altogether unsaleable there. That state of circumstances might not have been sufficient to make a constructive total loss, where the underwriter has guarded himself from being answerable for average losses, by a special clause in the policy. But we hold it to be total on the ground, and on that ground only, that upon the evidence they never could have arrived as hides at all. The present case appears to agree so nearly with that of *Dyson v. Rowcroft* (b), that no sound distinction in this respect can be made between them. And the judgment given by Lord *Alvanly* appears to us to govern the case now under discussion. He says, "unless the consequence of the damage sustained be the total loss of the commodity, the underwriter does not agree to be answerable, but if the commodity be totally lost to the assured, he undertakes to pay." And after discussing what is a total loss, he says, "the commodity here was in such a state that it could not be suffered to remain on board, consistently with the health of the crew; in consequence

(b) 3 Bos. & Puller, 474.

of this necessity, therefore, the commodity was annihilated, by being thrown overboard." We think the facts of the present case bring the hides into the same predicament, as the fruit there; either they would have been annihilated by putrefaction, or by being thrown overboard. And upon that supposition, a sale by the captain, which is found necessary and expedient for all concerned, made the loss not the less total. If then the loss be a constructive total loss, the only remaining question is whether a notice of abandonment was necessary in order to enable the plaintiff to recover.

The necessity of abandoning to the insurer all the right of the assured to what may be saved or recovered from the peril insured, arises out of the very nature of the contract of insurance, which is a contract of indemnity only, unless the underwriter is put into his place, as to all the benefit that may be derived from what has been actually saved or recovered from the loss.

Hence it has prevailed as a general rule, and that from so early a time, that it is difficult to find a case in the books in which it is not taken as an admitted principle, that in order to recover for a constructive total loss, the assured must first abandon. It is unnecessary, however, to refer to cases or authorities in support of this general principle, as it is admitted by the counsel for the plaintiff, that abandonment is necessary, in all cases of a constructive total loss, where any part of the thing subsists or remains in specie; and it is only denied that it extends to a case like the present, where what was saved has been actually sold and the money paid over to the agent of the assured, before any notice of the loss. In such a case, where the adventure is at an end, and nothing remains to be performed by the underwriter with respect to the part saved, it is argued that an abandonment is altogether useless, and consequently must be considered in law as unnecessary; and it is contended that there is neither decided authority nor reason in support of a contrary position. It will be convenient therefore to consider, first, what is the state of the authorities in the books on this precise point, and if the authorities shew that an abandonment is necessary, we will next consider whether there is any reason or principle for holding the present case not to fall within the general rule.

That the assured must abandon before he brings his action, where the ship has been captured and recaptured, and sold under the order of the *Vice Admiralty Court*; and where, after payment of the salvage to the re-captors, the remainder of the price has been paid into Court for the benefit of those who may claim as owners, appears clearly from the earliest case to be found in our books on the subject of abandonment, namely, *Pringle v. Hartley* (c). In that case, after the plaintiff had sued at law, for a total loss, and after proving an offer to relinquish his interest to the insurers, had recovered a verdict, Lord *Hardwicke*, on a bill filed for an injunction, held, that there was no ground for it, but that the plaintiff being willing to relinquish his interest in the salvage, to the underwriters, ought to have recovered the whole money insured. Now it must be admitted that this decision does not go the length of governing the present case; for in that case, as Lord *Hardwicke* afterwards observes, "It is uncertain whether the insured will receive any thing or not, and if any thing is recovered, he must have an allowance for his expenses in recovering." And there are even expressions used by Lord

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Hardwicke in giving his judgment, which rather lead to the inference, that if the money had been paid out of court, to the owner, before the action was brought, the jury might, in his opinion, have taken notice of it, and it might have been deducted out of the money recovered on the policy, so that the case of *Pringle v. Hartley* cannot be advanced as an express authority that an abandonment was necessary here. The case of *Mitchell v. Edie* (d), carries the law further, and indeed, almost to the length contended for in the present case. The goods were sold and paid into the hands of one *Cruden*, who was adopted by the assured as their agent. It was held that they were not entitled to recover for a total loss, because they had not abandoned in time. Both Mr. Justice *Ashurst*, and Mr. Justice *Buller*, use the most general terms, that in all cases where any part of the property is saved, the assured must abandon, and they apply that rule to the case before them, where the goods had been sold for the benefit of all.

The case of *Allwood v. Henckell*, sittings after *Michaelmas Term*, 1795, reported in brother *Park's* Book on Insurance, goes to the full extent of that in *Pringle v. Hartley* (f). The ship had been sold under order of the *Vice Admiralty Court* of *Antigua*, by a prize agent, who received the proceeds, and was to pay them over to those concerned, upon payment of one-eighth salvage to the captor. The question was, whether the abandonment was made in time? And it was therefore contended by the plaintiff that, admitting there was no abandonment, yet, as the property had been absolutely sold and converted into money, before the parties knew where the ship was taken to, the loss was absolutely total in its nature, and therefore there was no occasion for abandonment.

Lord *Kenyon*, though he did not give any decided opinion upon the point, said, he was inclined to think "that an abandonment was necessary, and that the case was the same as if the property had remained in *specie* at *Antigua*, and had not been sold;" and, as the plaintiff recovered, upon the footing of an average loss only, it would seem that Lord *Kenyon's* opinion was acquiesced in.

The next case, in order of time, is that of *Hodgson v. Blackiston*, 38th Geo. 3, K. B., (in *Park* on Insurance (g),) before the same noble and learned judge; and this, like the rest, though a *Nisi Prius* decision only, is a case directly in point; that a notice of abandonment is necessary, though the ship and cargo had been sold and converted into money, when the notice of the loss was received. The opinion of Lord *Kenyon* in this case must have been assented to, as law at the time, as no motion appears to have been made to set the verdict aside, and indeed the case itself is cited and relied upon, as authority by the Court of *Common Pleas*, in their judgment upon the case of *Read v. Bonham* (h). That case again is a distinct and direct authority upon the present point. There the ship had been sold and the money paid to the captain, and after a verdict for the plaintiff for a total loss, a new trial was moved for, on the ground that the sale of the ship had not been necessary, and that the abandonment had not been made in time; the Court, however, refused to grant a new trial upon either point, though Mr. Justice *Richardson* wished both to be considered by the jury. But it is evident,

(d) 1 T. R. 608.

(e) *Park* on Insurance, 280, 7th ed.

(f) 3 Atkyns, 195.

(g) 7th ed, 281, n. (a).

(h) 3 Brod. & Bing. 147.

from the report, that it was assumed as an undoubted principle by the whole Court, that abandonment was necessary; in that case the dissent of Mr. Justice *Richardson*, as to the time of the abandonment, making the inference still more strong, that in the judgment of the whole Court abandonment was necessary. And this statement of the case of *Read v. Bonham*, removes, in some degree, the weight of the judgment of Mr. Justice *Bayley*, in the case of *Cambridge v. Anderton* (i), as reported in *Carrington and Payne's Reports*, in which Mr. Justice *Bayley* is made to say, "I take the legal principle to be, that if by any perils, within the policy, the ship ceases to retain the character of a ship, the party may sell her, and recover as for a total loss, without any abandonment." And Mr. Justice *Bayley* cites the case of *Read v. Bonham*, as an authority in support of his opinion; which case, though certainly an authority for the position, that a sale of the ship in case of urgent necessity, is justifiable and constitutes a total loss, is no authority for the position that abandonment is unnecessary in that case, but an authority the other way. The case is afterwards reported in the 2d vol. *Barn. and Cress.* (j). Again the case of *Parry v. Aberdein* (k), is one that bears a strong resemblance to the present; there goods were sold as here, for the benefit of those concerned. But in that case, there had been an abandonment, upon which Lord *Tenterden* relies strongly in various parts of his judgment. And as to the case of *Manning v. Newnham* (l), on which considerable reliance was placed by the defendant, and in which it was supposed the plaintiff had recovered, without any abandonment; upon reference to the report of that case, it appears an abandonment had been made.

A necessity of abandonment, therefore, in the present case, so far as it stands upon authority, rests on the generality of expression used in all the early cases, that wherever the assured claims for a total loss, there being any thing saved, he must first relinquish to the underwriters all his interest in what remains. And, upon that express authority of the cases above referred to, in opposition to which there is found no other decided case than that of *Cambridge v. Anderton* (m), so that the balance of authority is clearly in favour of the position, that abandonment is necessary in the present case. And upon principle, if the matter were *res integra*, we should come to the same conclusion; for, as the assured is in no case bound to consider the loss a total loss, but may always take to what is saved, and recover for an average loss; if it is to be held, that abandonment is unnecessary, where there has been a sale, the underwriter can have no certainty as to his rights or liabilities, before the assured determines his election, by bringing the action for a total loss. This uncertainty in itself, if no other consequence follows,

(i) 1 Carr. & Payne, 214; S. C. 2 Barn. & Cress. 693.

(j) 2 Barn. & Cress. 693. There Mr. Justice *Bayley's* words are, "I take the legal principle to be this: If by means of any of the perils insured against, the ship ceases to retain that character and becomes a wreck, that is a total loss, and the master may sell her, and the assured may recover for a total loss without giving any notice of abandonment. This was decided in *Read v. Bonham*, 3 Brod. & Bing. 147, and al-

though *Richardson, J.* there differed from the rest of the Court, that was only upon the facts of the case, and not as to the legal principle upon which it was decided. And *Holroyd, J.* added, "Where the damage sustained makes the loss a total loss, it is unnecessary to give notice of abandonment."

(k) 9 Barn. & Cress. 411.

(l) 3 Doug. 180.

(m) 1 Carr. & Payne, 214; S. C. 2 Barn. & Cress. 693.

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is highly prejudicial to the underwriters. It may be further prejudicial in its direct consequences; agents may fail in whose hands the proceeds are left; the rate of exchange may alter where delay in procuring the remittance of the price has taken place; and, still further, the right of the underwriters to dispute the validity of the sale with the purchaser of the cargo, upon the ground of fraud, might, by the intervention of time, be impaired or entirely defeated.

As notice of abandonment, therefore, under the circumstances of this case, is an act of no difficulty to the assured, but of great service to the underwriter; as it is calculated to prevent fraud, as it is consistent with the general understanding which has prevailed in practice, and sanctioned by the authority of decided cases, we think it was a necessary preliminary to the plaintiff's right to sue for a total loss in the present case; and, therefore, for want of such notice of abandonment, we give our judgment for the defendant.

Nonsuit to be entered.

Jan. 30th.

LONG v. HUTCHINS.

Where an action is brought for false imprisonment, and the defendant afterwards prefers an indictment against the plaintiff, for an assault, which was the offence charged to have been committed when the plaintiff was imprisoned, the Court will not compel the plaintiff to try his cause, until the other proceedings are terminated.

BOMPAS, Serjt., shewed cause against a rule which had been obtained for judgment, as in case of a nonsuit, against the plaintiff for not proceeding to trial. The action was brought for false imprisonment. Since the commencement of the action, the defendant had gone before the grand jury, and preferred an indictment against the plaintiff for an assault, which was the offence alleged to have been committed by the plaintiff, for which he was imprisoned. The indictment had since been removed by *certiorari* into the Court of *King's Bench*, where it remained to be tried. It is submitted, that, under the circumstances, the plaintiff would have been much to blame if he had not withdrawn the record until the indictment was tried.

Atcherley, Serjt., supported the rule, and offered to accept a peremptory undertaking to try the cause.

Sed per Curiam.—It was not reasonable to expect that the plaintiff should proceed with his action, whilst your proceedings, which related to the same subject matter, were still pending. This rule must be discharged, and with costs.

Rule discharged.

Jan. 29th.

GRANT v. GIBBS.

Where a defendant is arrested, either in town or country, under a writ of *capias*, he has only eight days to put in and perfect special bail; the R. H. T. 2 W. 4, No. 14, being abrogated by the Uniformity of Process Act, 2 W. 4, c. 39.

A RULE had been obtained, calling upon the plaintiff to shew cause why proceedings taken upon the bail-bond should not be set aside. The defendant was arrested under a writ of *capias*, more than 40 miles from *London*. Bail was put in within eight days, but notice to the plaintiff's attorney was not given within that time, and the plaintiff then took proceedings on the bail-bond.

Kelly shewed cause.—This is a question of considerable importance, and involves a point which has not yet been decided. It is, whether a defendant, who resides more than 40 miles from *London*, has more than eight days after

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his arrest to put in special bail. It is submitted that all defendants, whether in town or country, are now in precisely the same situation, and have only eight days to put in special bail, and that if they neglect to do so, the plaintiff is at liberty to proceed against the sheriff, or on the bail-bond. On the other side, the rule of Court, *Hilary Term*, 2 Wm. 4, No. 14, will be relied on, which directs, that "In the case of country bail, the bail-piece shall be transmitted and filed within eight days, unless the defendant reside more than 40 miles from *London*, and in that case whith 15 days after the taking thereof." But by the subsequent Stat. 2 Wm. 4, c. 39 (a), this rule is abrogated, and new provisions are substituted. By sec. 16, it is enacted, "That all such proceedings as are mentioned in any writ, notice, or warning, issued under this act, shall and may be had and taken in default of a defendant's appearance, on putting in special bail, as the case may be." In the present instance the defendant was arrested on a writ of *capias*, the form of which is given in the schedule to this Statute, and in the body of the writ is the following notice: "And we hereby require the said [defendant] to take notice, that *within eight days* after execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of _____ to the said action, and that in default of his so doing, such proceedings may be had and taken as are mentioned in the warning hereunder written" (b).—[*Bosanquet, J.*—Do you contend that the rule of *Hilary Term*, 2 Wm. 4, is altogether void?—It is, or the argument for the plaintiff is not sustainable.—[*Park, J.*—Suppose a defendant lives at the very extremity of *England*.]—There would still be time enough to put in the bail within the eight days. The longest post is performed in less than 48 hours. If the Statute and rule are both held to be in force, the consequence will be, that a party in the country will have eight days to put in bail under the notice in the writ, and fifteen days after that period to transmit and file it, by virtue of the rule of Court. It has been already decided that the Statute repeals the rule of *Hilary Term*, 2 Wm. 4, No. 24, which also relates to the period within which proceedings can be taken on the bail-bond. *Hillary v. Rowles* (c); *Alston v. Underhill* (d). It may be contended, on the other side, that although a defendant may be required to *put in* bail within eight days, yet he is entitled to a further period, to give notice to the plaintiff's attorney that the bail has been put in; but by a rule of this Court (e), it is ordered that special bail shall not be considered as put in until such notice shall be given. This rule of Court may be properly referred to for the purpose of explaining what is meant in the notice in the writ of *capias*, which requires the defendant to put in bail within eight days. Here the defendant neglected to give notice to the plaintiff's attorney within the eight days that the bail was put in.

Merewether, Serjt., contra.—The question is, whether the Statute 2 Wm. 4, c. 39, repeals the rule of *Hilary Term*, 2 Wm. 4. The 14 sec. of the same Statute may be material; it enables the judges "from time to

(a) The Uniformity of Process Act.

(b) The third warning is, "If a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff, or on the bail-bond."

(c) 2 Dowl. P. C. 201; S. C. 5 Barn. & Adol. 460.

(d) 2 Dowl. P. C. 26; S. C. 1 Cr. & Mee. 492.

(e) E. 49 Geo. 3.

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time to make all such general rules and orders as in their judgment shall be deemed necessary or proper." It is submitted, that the rule of *Hil. 2 Wm. 4*, must be considered to be still in force, as the judges have made no new rule upon the subject of putting in bail. As to the argument, that the expression "put in," used in the writ of *capias*, includes that notice must also be given to the plaintiff's attorney within eight days, it is a forced construction of the words, and will prove very inconvenient to defendants who reside in remote parts of the country, and at a distance from their professional advisers.

TINDAL, C. J.—If the rule of *Hil. 2 Wm. 4*, which has been referred to, were still in force, the defendant might have shewn good ground for setting aside the proceedings taken against the bail; but the Stat. 2 *Wm. 4*, c. 39, which passed on the 23d of *May*, 1832, contains provisions utterly inconsistent with the former rule which had been promulgated.—[His Lordship here read through those portions of the Stat. which were cited in the argument.]—The second point which has been commented upon refers to the construction which ought to be given to the words "put in," and reference has been made to a former rule of this Court (*f*), which directs that bail shall not be considered as put in until notice to the opposite party has been given. We should be flying from the known and obvious meaning of these words, if we were to say that the legislature used them in any other sense, than that in which this Court had previously understood them. Under the circumstances of this case, as the act of the defendant in not putting in bail in proper time might have been an innocent act, and as this question has not been previously determined, the proceedings must be set aside upon payment of costs.

PARK, J.—This is a case of considerable difficulty, and at first sight I should have thought that the rule of *Hilary Term* was still in force; but as it appears that the subsequent Statute has abrogated the rule, it only now remains for the consideration of the Court, whether a new rule should not be made for future practice; for defendants who live at a distance ought perhaps to have a longer time than eight days allowed them to put in special bail. I agree that the rule of *Easter Term*, 49 *Geo. 3*, expressly puts a meaning on the words "put in," and that we must construe them with reference to that rule.

The other judges concurred.

Rule absolute, upon payment of the plaintiff's costs.

(*f*) R. E. 49 *Geo. 3*, C. P. Tidd's *Prac.* 253, 9th ed.

Jan. 31st.

FORD v. BOUCHER.

Where a plaintiff is a mariner and is abroad on a voyage, his family being left in this country in lodgings; *Held*, that he will not be required to give security for costs.

WILDE, Serjt., shewed cause against a rule which had been obtained, calling upon the plaintiff to give security for costs. By the affidavits, it appeared that the plaintiff was a master mariner, now absent on a voyage, but his family expected he would return at the usual period. The affidavits upon which the rule *nisi* was granted, imputed insolvency to the plaintiff, which was now positively denied. It is submitted, that, under such circumstances, the rule ought to be discharged, with costs.

Ryland, in support of the application, cited *Wells v. Barton* (a). There the plaintiff had left *England* for *America*, and although it was sworn that he was only temporarily absent, he was compelled to give security for costs. By the affidavits on the other side, it appeared that the plaintiff's family is now residing in lodgings.

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TINDAL, C. J.—The affidavits upon which this rule was obtained state circumstances which turn out to be untrue. I cannot accede to the general rule laid down in the case which has been cited. The rule must be discharged, with costs.

The other judges concurred.

Rule discharged (b).

(a) 2 Dowl. P. C. 160.

(b) Vide *Orr v. Bowles*, ante p. 23; *Kasten v. Plaw*, 1 Moo. & Payne, 30.

BARNES dem. v. JACKSON and o^r

Jan. 22d.

QUARE *Impedit* against three defendants, the patron, the bishop, and the incumbent. The writ was returnable on the 8th of *January*, 1834; two defendants appeared on the 11th of *January* following, but the sheriff returned *nihil* as to *Jackson*, the incumbent. The demandant then sued out an *alias quare impedit* returnable on the 15th of *April*, 1834, upon which *Jackson* was summoned and appeared. The declaration against all the defendants was delivered on the 10th of *January*, 1835.

1. The Rule that a plaintiff must declare within one year from the return day of the process, applies to real as well as personal actions.

Bere obtained a rule to set aside the proceedings for irregularity, upon the ground that the demandant was bound to declare within one year from the return day of the first writ of *quare impedit*.

2. The Rules of Hil. T. 2 W. 4, apply only to actions over which the courts of common law have a concurrent jurisdiction, and therefore Reg. 35 does not apply to a *quare impedit*.

Coleridge, Serjt., shewed cause, and contended that the rule which had been established, requiring a plaintiff to declare within one year from the return day of the process, did not apply to real actions. Here the demandant was unable to summon the incumbent, and admitting that the declaration is too late as to the other defendants, the demandant is still entitled to proceed against the incumbent. The interests of the bishop, the patron, and the incumbent, are quite separate and distinct, and the proceedings might have been originally taken against one.

Wilde, Serjt., *Bompas*, Serjt., and *Bere*, *contrd.*—The Books lay down no express rule as to the time to declare in real actions, but they plainly shew that originally, real and personal actions were considered in the same point of view. It is clear that in personal actions the plaintiff is bound to declare within one year from the return of the writ, *Orley v. Lee* (a); and in this Court he must declare before the end of the second term, *Sykes v. Bauwens* (b). In joint actions, the plaintiff may obtain further time to declare against all the defendants, in case one of them cannot be served with process. —[*Tindal*, C. J.—That is where there is one judgment against all the

(a) 2 Term Rep. 112.

(b) 2 Bos. & Pul. N. R. 404.

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defendants. Here the proceedings are in the nature of separate actions against each of them.]—By R. H. T. 2 W. 4, No. 35, it is ordered that “a plaintiff shall be deemed out of Court unless he declare within one year after the process is returnable.”

Cur. adv. vult.

TINDAL, C. J.—This rule calls upon the plaintiff to shew cause why the declaration against the defendants should not be set aside for irregularity, on the ground that the writ of *quare impedit*, upon which two of the defendants had been duly summoned, and had appeared, had been returnable for more than a year before the declaration was delivered. The writ of *quare impedit*, upon which two of the defendants were summoned, was returnable on the 8th of *January*, 1834, and the defendants appeared thereto on the 11th of *January*, 1834, and the sheriff having returned *nihil* as to the third defendant, *Jackson*, the incumbent, an *alias quare impedit* was issued, returnable on the 15th of *April*, on which *alias* writ he was summoned, and appeared. The declaration in *quare impedit* was not delivered till the 10th of *January*, 1835. One ground upon which the motion was urged was the new rule of Court of *Hilary Term*, 2d *William* the 4th, R. 35; but we think these rules do not extend to real actions, but to those proceedings only in which the common law Courts of *Westminster* exercise concurrent jurisdiction (*c*).

But the ground principally relied on, is the general rule of law, by which a plaintiff must declare within 12 months after the return of the writ. This is laid down by Mr. Justice *Buller*, in *Orley v. Lee* (*d*), as an acknowledged rule of practice, not that the defendant can sign any judgment of *non pros* for not declaring, for no such judgment can be signed until after a demand of declaration, but that after the lapse of 12 months from the return of the writ, the delivery of the declaration comes too late. The same rule is admitted in *Penny v. Harvey* (*e*), and in *Morton v. Bothwick* (*f*). In *Cooper v. Nias* (*g*), the question arises whether the twelvemonth is to be calculated from the return day of the writ, or the time of the appearance, and the Court say, “the rule is, that if the plaintiff does not declare within a year after the return day of the writ, he is out of Court. The safest course is to reckon the 12 months from the return day; the time given to put in and perfect bail is merely matter of indulgence.” No case appears by which this rule has been shewn to be applied to real actions; but at the same time no distinction is made in the books, between actions real and personal; and the rule in principle applies equally to actions of all kinds; the object being, that suits should not be kept alive an unreasonable time after the parties are in Court; and if the demandant is not bound to declare within one year, there seems to be no reason why he should not be at liberty to do so for an indefinite period. The plaintiff or demandant are not injured by this rule, for if he has any reason for not declaring on account of all the parties not being brought into Court, it is a very constant course to apply for time against those who have not appeared.

We therefore think the plaintiff is out of Court as to the two defendants who appeared under the original writ, and that the declaration is irregular as

(c) See *Miller v. Miller*, ante, 31.

(d) 2 Term Rep. 112.

(e) 3 Term Rep. 123.

(f) 9 Barn. & Cres. 544.

(g) 3 Barn. & Ald. 271.

to them, and must be set aside. But as to the defendant *Jackson*, who appeared upon a writ returnable in *April*, the plaintiff is in time to delare, and as against him, the proceedings may go on.

Rule absolute as to two defendants, and discharged as to *Jackson*.

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CRANCH v. WHITE.

Jan. 14th.

TROVER. The action was brought to recover a bill of exchange for 200*l.*, which had come into the hands of the defendant, under the following circumstances. The bill in question was drawn by the plaintiff, and given by him to one *Boyer*, for the purpose of getting it discounted for his (the plaintiff's) accommodation. *Boyer* indorsed the bill to one *Roberts*, who said he could get it discounted, and *Roberts* then applied to the defendant, who was then living with his mother, assisting her in carrying on her business, and requested him to get the bill discounted by his mother, which he promised to do, whereupon *Roberts* indorsed and delivered the bill to him. The defendant afterwards neglected to deliver back the bill or to get it discounted; and the reason alleged was, that *Roberts* was indebted to the mother, in a larger sum of money than the amount of the bill. A joint demand of the bill was then made upon the defendant and his mother, and it not being returned, the present action was brought, and at the trial before *Tindal*, C. J., at *Guildhall*, the jury, upon the facts above stated, found a verdict for the plaintiff.

1. Where a servant received a bill of exchange from *A.* making a promise that his master should discount it, which he then delivered to his master, who kept the bill as a security for money due from *A.* and refused to discount it: *Held*, that the servant was liable to an action of trover for the recovery of the bill.

Aitcherley, Serjt., moved for a new trial, and he made two points.—*First*, That *trover* could not be maintained against the defendant who was a mere servant to his mother. If the defendant had been sued for money had and received, the plaintiff could not have recovered, for he received the bill for the use of his mother, and she was answerable to the plaintiff. *Stephens v. Badeock* (a). And the action was originally founded on contract, the plaintiff cannot be permitted to change it into a *tort*, and thereby alter the situation of a defendant. Thus in *Jennings v. Rundall* (b), it was held, that a plaintiff could not so change the form of action, as to deprive an infant defendant of his plea of infancy; and in *Powell v. Layton* (c), the same principle is acknowledged. The plaintiff might have sued the mother in an action founded on her contract to discount the bill, and she would then have been in a situation to avail herself of the defendant's evidence, and the real facts of the transaction would have appeared. *Secondly*, If *trover* was maintainable, it should have been brought against the mother, for there was no sufficient evidence of a conversion of the bill, by the defendant. The defendant received the bill for the use of his mistress, and after he had delivered it to her, he ceased to have any control over it. The demand made by the plaintiff was a joint demand, and the bill was not then in the legal custody of the defendant.

TINDAL, C. J.—Two objections have been raised upon this motion. *First*, That in point of law, an action of *trover* was not maintainable, but that the form of it should have been in contract. *Secondly*, That admitting

(a) 3 Barn. & Adol. 354.

(b) 8 Term Rep. 335.

(c) 2 Bos. & Pul. New Rep. 365.

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it to be maintainable, it ought to have been brought against the defendant's mother. As to the first part, let us see the facts of the case.—The plaintiff is the owner of the bill of exchange, and desiring to have it discounted, he delivers it to *Boyer*, who delivers it to *Roberts*, and the latter indorses it to the defendant, with an understanding that he was to get it discounted; and it must be taken, by the finding of the jury, that the defendant was acting wrongfully when he received the bill, which was subsequently kept back for the purpose of paying a debt due to his mother. It is contended, that where the transaction is founded on contract, a plaintiff cannot, by changing the form of action, deprive the defendant of pleading any defence; which he might have done, if the action had been in contract. I go quite the length of that proposition. *Powell v. Layton* (d), was such a case, where the form of action was in *tort*, and the Court held, that the defendant should not be ousted of his right to plead in abatement, that other persons were jointly liable with himself. So again in *Jennings v. Rundall* (e), which was brought in *tort*, for immoderately riding the plaintiff's mare; the Court held, that the defendant might still plead his infancy in defence of the action. These two cases do not say, that the form of action was misconceived, and the plaintiffs are not consequently nonsuited; but merely, that the defendants shall not be prevented from setting up the same defence as they could have done, if they had been sued in actions founded on contract; but in the present case, if the plaintiff had declared in contract, I do not see that the defendant would have been placed in a more favourable situation.

Secondly, It is said, if the form of action might be in *trover*, it should have been brought against the mother and not against the son; but I have always understood, that in a wrongful act, all are principals and equally liable. In *Perkins v. Smith* (f), it is solemnly decided, that *trover* lies against a servant who disposes of goods, the property of another, to his master's use, which is the very point now under discussion. *Lee, C. J.*, there said, "the gist of *trover* is, the detainer or disposal of goods wrongfully; and it is found that the defendant himself disposed of them to his master's use, which his master could give him no authority to do. I am very well satisfied that this servant has done wrong, and that no authority that could be derived from his master, before or after the fact, can excuse him." Then it is said, that in the present case there was no conversion. What is conversion? A mere refusal to deliver goods is not a conversion, but if the refusal is not met by some explanation to justify it, it may be evidence of the conversion. In 10 *Coke*, 56 *E.* it is said, "If *A.* brings an action on the case against *B.*, upon *trover* and conversion of plate, &c., and the defendant pleads not guilty, now it is good evidence, *prima facie*, to prove a conversion, that the plaintiff requested the defendant to deliver them and he refused; and, therefore, it shall be presumed that he has converted them to his use." And a similar proposition is laid down in 1 *Rollé's Abridg.* 5, 45 (g). *Perkins v. Smith*, has also been recognised in the case of *Stephens v. Elwall* (h). It seems to me, therefore, upon the facts found in this case, that the present action was maintainable.

(d) 2 Bos. & Pul. New Rep. 370.

(e) 3 Term Rep. 335.

(f) 1 Wils. 328.

(g) If a man finds my goods, and knows

them to be mine, and I demand them, and he refuses to deliver them; this is a conversion in law. Mich. 38, 39 El. B. R.

(h) 4 Maule & Sel. 260.

PARK, J.—I am entirely of the same opinion. The language of Lord Ellenborough, in *Stephens v. Elwall*, is very strong; he says, "The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance, and for his master's benefit, when he sent the goods to his master; but nevertheless, his acts may amount to a conversion: for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer, that he acted under authority from another, who had himself no authority to dispose of it." In the present case, the defendant acted with a perfect knowledge of the circumstances under which the bill was delivered to him, and he chose to apply the bill in payment of his mother's debt; but in the case last mentioned, the clerk acted in ignorance, and yet he was held liable. In *Alexander v. Southey*, the cases cited were considered, and approved of; and I am of opinion, that this action was maintainable.

The other Judges concurred.

Rule refused.

GEORGE v. ELSTON.

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Jan. 31st.

TRESPASS against three defendants, who pleaded jointly, and who appeared by the same attorney. The plaintiff recovered a verdict, with damages, against one, but the other two defendants obtained a verdict in their favour. A rule *nisi* had been obtained, calling upon the plaintiff to shew cause why the prothonotary should not set off the costs payable to the two defendants, against the costs which the plaintiff was entitled to recover from the other defendant.

Where in an action of trespass a verdict is found against one defendant but in favour of another, the costs may be set off, notwithstanding the effect of it would be to deprive the attorney of his lien. Reg. H. T. 2 W. 4, No. 93, does not apply to such a case.

Kelly shewed cause.—If this rule is made absolute the attorney for the plaintiff will be deprived of his lien for his costs. By the former practice of this Court, such an application as the present might have succeeded. *Schoole v. Noble* (a); *Nunez v. Modigliani* (b); *Bourne v. Bennett* (c). But the Court of *King's Bench* has refused in general to allow a set-off, to the prejudice of the attorney's lien for his costs. *Mitchell v. Oldfield* (d), *Randle v. Fuller* (e), and in *Mordecai v. Nutting* (f), which was a case like the present, this Court refused to permit the costs of the defendants, who were acquitted, to be deducted from the costs recovered by the plaintiff against another defendant. But now the practice of the Court is altered, by, R. H. T. 2 Wm. 4, c. 93, which it is submitted is applicable to the present case. It orders, "That no set-off of damages or costs between parties shall be allowed, to the prejudice of the attorney's lien for costs, in the particular suit against which the set-off is sought, provided nevertheless that interlocutory costs in the same suit, awarded to the adverse party, may be deducted." The object of this rule is to preserve the attorney's lien for his costs.

Wilde, Serjt., contra.—*Barnes* is an authority not to be relied upon. In

(a) 1 H. Black. 24.
(b) 1 H. Black. 217
(c) 4 Bing. 433

(d) 4 Term Rep. 123.
(e) 6 Term Rep. 456.
(f) *Barnes*, 145.

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the very next page of his book it is held, in *Roberts v. Biggs* (g), that the costs in one suit may be set off against the costs in another. But the point at issue is, whether rule 93, which has been cited, applies to this case. It is submitted that it does not, for the costs here sought to be set off by two of the defendants, are incurred in the same suit as that which has entitled the plaintiff to costs against the other defendant. The plaintiff's attorney will not, in such a case, be permitted, by claiming his lien, to defeat the equity between the parties.

TINDAL, C. J.—The rule *H. T. 2 Wm. 4*, does not apply to the present case, because this is a set-off claimed by parties in the same suit. The rule only refers to the set-off of damages or costs in other suits. *Schoole v. Noble* (h) is quite in point with the present case.

The rest of the Court concurred.

Rule absolute.

(g) *Barnes*, 146.

(h) 1 H. Black. 24.

Jan. 30th.

HUMPHREY v. WOODHOUSE and o^r

A judge has no power under Stat. 3 & 4 W. 4, c. 42, sec. 32, to certify to deprive a police officer of his costs who is a defendant in an action and obtains a verdict; as that Statute does not repeal sec. 41 of the Police Act 10 G. 4, c. 44, which gives police officers their costs absolutely.

TRESPASS against four defendants for an assault and false imprisonment.

At the trial, before Tindal, C. J., at the sittings for *Middlesex*, the plaintiff succeeded against two of the defendants, but the jury found a verdict for the other two, who were police-officers, acting in execution of their duty. After the trial, the learned judge certified, under Stat. 3 & 4 Wm. 4, c. 42, sec. 32 (a), that there was a reasonable cause for making the two officers defendants.

Busby obtained a rule, calling upon the plaintiff to shew cause why the learned judge's certificate should not be set aside, upon the ground that the police-officers were entitled to their costs, by Stat. 10 Geo. 4, c. 44, sec. 41, (the Metropolitan Police Act), which directs, that in all actions commenced against any person for any thing done in pursuance of that act, "if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action, after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases."

Wilde, Serjt., and *Humphrey*, shewed cause.—Here the defendants appeared by one attorney, and were defended by one counsel at the trial. The certificate of the learned judge shews, that he considered that the plaintiff had reasonable cause for joining the defendants, who were acquitted. The judge had formerly a power to certify under the Stat. 8 & 9 Wm. 3, c. 11,

(a) Sec. 32. That where several persons shall be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, or upon the trial of such action shall have a verdict pass for him or them, every such person shall have judgment for and

recover his reasonable costs, unless, in the case of a trial, the judge before whom such cause shall be tried shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action.

sec. 1, and the subsequent Stat. 3 & 4 Wm. 4, c. 42, sec. 32, merely extends the remedy given by the former Statute. By the Stat. 8 & 9 Wm. 3, c. 11, a defendant, when acquitted, could only recover his costs, as if a verdict had been given against the plaintiff, which were found inadequate to remunerate police-officers, and therefore, by the Stat. 10 Geo. 4, c. 44, sec. 41, they are given their full costs, as between attorney and client; and that was the only object of that part of the Statute. If it had been intended that the judge should not continue to have the power to certify, which was intrusted to him by Stat. 8 & 9 Wm. 3, c. 11, it would have been taken away by express words. If this was the state of the law before the passing of the Stat. 3 & 4 Wm. 4, c. 42, then the power to certify still remains with the judge who tries the cause, under sec. 32 of that Statute. The words used are, "defendants in any personal action;" and as no exception in favour of police-officers is inserted, it is submitted that the Court will give a just construction to that section, by holding that the power to certify extends to the case of all defendants, whether they be police-officers or not.

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Busby, in support of the rule.—The decision in this case will be applicable to determine the right of police-officers and magistrates to recover costs, under many Statutes besides the Metropolitan Police Act, and therefore the question is of importance. The language of the Stat. 10 Geo. 4, c. 44, is absolute and unqualified. It was passed for the protection of police-officers, and by the latter part of sec. 44, the plaintiff cannot recover costs against them even when he obtains a verdict, unless the judge certifies his approbation of the action. If the question rested upon this Statute alone, no doubt could be entertained about the point at issue. The Stat. 3 & 4 Wm. 4, c. 42, sec. 32, was passed to amend defects which existed under the Statute of Wm. 3, and it had no other object. It would be a great hardship to police-officers, who are generally in humble circumstances, if they were not allowed to recover their full costs; and it was the policy of the Metropolitan Police Act to protect them as much as possible.

TINDAL, C. J.—Having these Statutes brought before me, I am of opinion that I was not authorized to certify in this case. Upon looking more closely at the Stat. 3 & 4 Wm. 4, c. 42, it seems to me that the only object of the 32 section, was to apply a remedy to the Stat. 8 & 9 Wm. 3, c. 11, which had been found defective in three points.—*First*. It only gave costs to defendants who were acquitted, in certain specified actions, *viz. trespass, false imprisonment, or ejectione firmae*, whereas the subsequent Statute applies to all personal actions.—*Secondly*. The former Statute only applied to defendants who were acquitted *by verdict*, and the Stat. 3 & 4 Wm. 4, extends to those defendants who shall have a *nolle prosequi* entered.—*Thirdly*. The latter Statute gives defendants their reasonable costs of suit; whereas, under the former Statute, in certain cases, they recovered only 40s. These being the principal objects of this Statute, and as it does not contain any express reference to the case of police-officers, I am of opinion that it had not for its object the repeal of the intermediate Statute, the 10 Geo. 4, c. 44, sec. 41. This rule must me made absolute.

PARK, J.—It might have been supposed the words in the Stat. 3 & 4 Wm. 4,

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c. 42, sec. 32, being general, that the former Stat. 10 *Geo.* 4, was repealed; but upon considering the question, I think it was only intended to operate upon the former Stat. 3 & 4 *Wm.* 3, c. 11. The provisions contained in the Metropolitan Police Act were passed for the purpose of throwing protection around a class of persons who are employed in difficult and dangerous services; and, as it has been stated by Mr. *Busby*, if a plaintiff succeeds in an action, he cannot even then recover his costs unless the judge signifies his approbation of the action. I think it was very judicious to grant a certificate in this case, in order that this important question might be properly investigated.

VAUGHAN, J.—Upon looking at the 33 section of the Stat. 3 & 4 *Wm.* 4, c. 42, I do not think it was intended to interfere with the Metropolitan Police Act.

BOSANQUET, J., concurred.

Rule absolute.

BRAMAH and an' v. BAKER and others.

In an action on a bill of exchange by indorsee against acceptor, a plea alleging only that the acceptance was obtained by fraud, is bad.

In a similar action, to a plea alleging that the acceptance was obtained by fraud, and that the plaintiff gave no consideration for the bill, it is sufficient for the plaintiff to reply that he did give consideration, without setting out the particulars of the consideration.

THIS was an action by the plaintiffs, as indorsees of a bill of exchange for 500*l.* against the defendants, as acceptors. The declaration contained a count on the bill, in the common form; a count for interest, and an account stated. The defendants pleaded the general issue to the whole declaration.

Second plea.—That there was not at any time any consideration or value for the defendants accepting the said bill of exchange, in the said first count mentioned, or paying the amount thereof, or any part thereof; and that the said bill, indorsed by *W. C.*, was afterwards, to wit, on the fourth day of *January*, in the year of our Lord 1834, delivered on behalf of the defendants to one *T. H.*, for a special purpose only, to wit, that the said *T. H.* should keep and take care of the said bill of exchange, for and on behalf of the said defendants, and for their use and benefit, and not for the purpose of being negotiated or delivered over by him, or by any other person or persons whatsoever; and the said *T. H.* then took and received, and from thence until the said plaintiffs became possessed of the same as hereinafter mentioned, held the said bill, for the special purpose aforesaid; and that the said *T. H.*, in violation of good faith, and contrary to the said special purpose for which he so received and held the said bill as aforesaid, heretofore, and whilst he held and had the same in his possession for the special purpose aforesaid, to wit, on the day and year last aforesaid, fraudulently and without the authority of the defendants, and with intent to defraud the said defendants in the introductory part of the first plea named, negotiated and parted with the said bill for his own use and benefit, and then delivered the said bill of exchange, so indorsed as aforesaid, to the plaintiffs; and that the said bill of exchange was not at any time indorsed to the said plaintiffs, otherwise than by the said *T. H.*'s so delivering the same, so indorsed by the said *W. C.* as aforesaid, to the said plaintiffs; and that the said plaintiffs at the time when the said bill of exchange was so delivered to them as aforesaid, by the said

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T. H. as aforesaid, had notice of the premises, and well knew that the said *T. H.* had no power or authority to negotiate or part with the same on his own account; and that there was not at any time any consideration or value given in good faith for the said indorsement of the said bill of exchange to the said plaintiffs, as in the said declaration mentioned; and this the said defendants, in the introductory part of this plea mentioned, are ready to verify.

Third plea.—That the said bill of exchange, in the said first count mentioned, never was accepted by the said defendants, except by the said *Evan Meredith Roberts*, for and on account of himself and all the said other defendants in this action mentioned, under and by virtue of an authority from the said last-mentioned defendants to the said *Evan Meredith Roberts*, to accept bills of exchange on behalf of himself and all the said other defendants, for particular purposes only, that is to say, for the purposes of discharging claims against certain persons composing a certain company, called the South Metropolitan Gas Light and Coke Company, or upon the said *Evan Meredith Roberts*, and the said other defendants as directors of the said company; but that the said *Evan Meredith Roberts*, on the 22d of *October*, in the year of our Lord 1833, in breach of good faith, fraudulently and wrongfully, and without the consent or authority of the defendants in the introductory part of the said first plea named, and with intent to defraud them, accepted the said bill of exchange in the said first count mentioned, on behalf of himself, and all the other defendants in this action; and not on account of, or for any of the purposes for which he was authorized to accept bills on behalf of himself and the said other defendants as aforesaid, but for another and different purpose, to wit, for the private purposes of the said defendant, *William Clare*, who drew the same, and who then had no claim or demand whatever on the said other defendants, and of himself, the said *Evan Meredith Roberts*, and the said defendant, *Lewis Roberts*; and that the said defendants in the introductory part of the said first plea named, received no consideration or value for the said acceptance; and this the said defendants in the introductory part of the said first plea named, are ready to verify, &c.

Replication to second plea.—And as to the plea of the said last-mentioned defendants, by them secondly above pleaded, as to the breach of the said promise in the said first count of the said declaration mentioned; the plaintiffs say, that after the making the said bill of exchange, in the said first count mentioned, and before the same had become due and payable, to wit, on the fourth day of *January*, in the year of our Lord 1834, the said bill of exchange was indorsed and delivered to the plaintiffs fairly and *bonâ fide*, and for a good and valuable consideration, that is to say, for moneys advanced by, and due and owing to them, the plaintiffs; and the plaintiffs further say, that at the time when the said bill of exchange was so indorsed and delivered to them, as aforesaid, they had not, nor had either of them notice of the premises in the said last-mentioned plea mentioned, nor did they or either of them know that the said *Thomas Hunt* had no power or authority to negotiate or part with the said bill on his own account, and this they are ready to verify.

Replication to third plea.—And as to the plea of the said last-mentioned defendants by them thirdly above pleaded, as to the breach of the said promise in the said first count mentioned; the plaintiffs say, that the said *Evan Meredith Roberts* was duly authorized to accept the said bill of ex-

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change in the said first count mentioned, on behalf of himself and all the other defendants in this action. And the plaintiffs further say, that after the making the said bill of exchange, and before the same had become due and payable, to wit, on the said fourth day of *January*, in the year of our Lord 1834, the said bill of exchange was indorsed and delivered to the plaintiffs fairly and *bonâ fide*, and for a good and valuable consideration, that is to say, for moneys advanced by, and due and owing to them, the plaintiffs; and the plaintiffs further say, that at the time when the said bill of exchange was so indorsed and delivered to them as aforesaid, they had not, nor had either of them notice of the premises in the said last-mentioned plea mentioned, nor did they or either of them know for what purposes the said *Evan Meredith Roberts* was authorized to accept the said bill of exchange, nor for what purpose he accepted the same, and this they are ready to verify, &c.

To this replication there was a special demurrer, for the following causes: That the said plaintiffs have not in their said last-mentioned replication stated or set forth with sufficient certainty what consideration or value was given by them, the said plaintiffs, for the said indorsement of the said bill of exchange to them the said plaintiffs, but have merely stated that the consideration for the said indorsement to them was moneys advanced by, and due and owing to them the said plaintiffs, without stating with sufficient certainty when or to whom such moneys were advanced, or by whom the same were due and owing, or whether they were advanced at the time when the said bill was indorsed to them, or whether they had been previously advanced, and were due before the said bill was indorsed; and that although the replication is intended as an answer to the second plea, and to support the whole of the said plaintiffs' claim to the full amount of the bill mentioned in the declaration, yet it does not aver or state with sufficient certainty that the moneys so advanced by, and due and owing to them the said plaintiffs, were equal to the amount of the said bill, or entitled them to recover to the full extent of the said bill, which, according to the rules of pleading, ought to have been shown, stated, and set forth, in the said replication to the said second plea; and for that the said plaintiffs, who were parties to the indorsement of the said bill, and knew what consideration they gave for the same, ought to have set forth in the said last-mentioned replication with more certainty than they have done, the nature and extent of the consideration which they gave for the said indorsement, and when that consideration was given, to have enabled the defendants, who were no parties to the indorsement, or to the alleged consideration for the same, to know and ascertain what that consideration, if any, was, and also to have enabled the Court to decide, as a point of law, whether such consideration was or was not sufficient to support the plaintiffs' claim to recover the full amount of the bill against the defendants, under the circumstances mentioned in the second plea, which is a mixed question of law and fact: And also, for that the said replication is in other respects uncertain, informal, and insufficient, and the said defendants, *William Baker, James Foster, George Holgate Foster, William Lyall, and Frederick Blackley*, as to the replication of the said plaintiffs to the plea of them the said last-named defendants, by them thirdly above pleaded, say, that the same replication is not sufficient in law; and the said last-mentioned defendants state, and shew to the Court here, the following causes of demurrer to the said last-mentioned replication, that is to say, that whereas the said last-named defendants have, in

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their said third plea, alleged that the said bill of exchange never was accepted by the said defendants, except by the said *Evan Meredith Roberts*, for and on account of himself, and all the other said defendants in this action, under and by virtue of an authority from the said last-mentioned defendants to the said *Evan Meredith Roberts*, to accept bills of exchange on behalf of himself and the said other defendants, for such particular purposes only as in the said last plea mentioned, but that the said *Evan Meredith Roberts* accepted the said bills of exchange, in the said first count mentioned, on behalf of himself and all the other defendants in this action, not on account of any of the purposes for which he was so authorized to accept bills on behalf of himself and the said other defendants as aforesaid, but for another and different purpose; yet the said plaintiffs, in their replication to the said last-mentioned plea, have not confessed and avoided the same allegations in the said last-mentioned plea, or directly traversed the same, or either of them, but by alleging that the said *Evan Meredith Roberts* was duly authorized to accept the said bill of exchange, in the said first count mentioned, on behalf of himself and all the other defendants in this action, have, contrary to the rules of pleading, denied the said allegations by an argumentative traverse thereof; and further, that the said plaintiffs, if they had intended to raise the question, whether or not the said bill was duly accepted by the said *Evan Meredith Roberts*, ought to have distinctly taken issue upon some one of the facts mentioned in the plea, or alleged that it was accepted for the purposes for which the said *Evan Meredith Roberts* was authorized to accept bills, as mentioned in the said last plea; and also, for that the said plaintiffs do not in their replication confine themselves to traversing the last plea in manner above alleged, but also by their said replication proceed to plead by way of avoidance of the matters alleged in the last plea, by stating and alleging in their said replication thereto, that, after the making the said bill, and before the same had become due and payable, the said bill of exchange was indorsed and delivered to the plaintiffs fairly, and *bonâ fide*, and for a good and valuable consideration, and that when the said bill was so indorsed and delivered to them, they had not, nor had either of them, notice of the premises mentioned in the last plea, which premises, in fact, they actually traversed in the commencement of the replication; and also, for that the last-mentioned replication is double and multifarious, and attempts to answer the last plea, both by traversing the substantial allegations contained in it, and also by attempting to shew matters in avoidance of the plea, if confessed without confessing it; also, for that the said plaintiffs do not, in their said last-mentioned replication, state or shew with sufficient certainty when or to whom the moneys therein alleged to have been advanced, and due and owing to them, were advanced, or by whom they were due and owing, or what was the amount of such moneys; and also, for that the said last-mentioned replication should have concluded to the country, as being a traverse of the last plea, and not with a verification; and also, for that it is uncertain whether the last replication is intended as an answer to the plea by way of traverse or of confession and avoidance thereof, and is in other respects uncertain, informal, and insufficient, and no certain issue can be taken thereon.

Joinder in demurrer.

Bompas, Serjt., in support of the demurrer.—This case is distinct from that

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in which a want of consideration alone is pleaded; here there is an allegation of fraud, which of itself throws a stain on the title of the plaintiff. The new rules of pleading have made no difference in the law relating to bills of exchange; before those rules an allegation of fraud would so affect the title of the plaintiff, as to throw upon him the proof of consideration even without notice; the *prima facie* privilege of a bill of exchange, that it implies a consideration, is removed by the allegation of fraud, and the bill becomes a mere simple contract, and the plaintiff must prove the consideration upon which the promise is founded. In this case the pleading must be taken most strongly against the party pleading, for the consideration cannot be in the knowledge of the defendant.

Kelly, contra, was stopped by the Court from arguing on the insufficiency of the third plea. As to the replication, there is no difference between a replication to a plea alleging fraud, and a plea simply alleging a want of consideration. It would be extremely inconvenient, if in any case the plaintiff should be compelled to set out in his replication all the circumstances which constituted the consideration which he gave for the bill. Such a course would necessarily lead to the most prolix statements.

TINDAL, C. J.—The third plea in this case amounts to nothing more than this, that the defendants were defrauded of their acceptance, and that it was given without consideration. Every indorsee is assumed to hold for valuable consideration, and it is too much for us to presume a notice, which would make him a party to a fraud, in taking the bill after notice of the fraud. As then the plea is silent on the want of consideration by the plaintiffs, and no notice having been given of the fraud, we are to ask ourselves whether, after a transfer of the bill, the mere circumstance of the acceptor having been defrauded when he accepted the bill, is an answer to an innocent indorsee for valuable consideration without notice. It seems to me that it is not.

The second plea, upon which greater reliance is placed by the defendants, comprehends the two circumstances in which the third plea is deficient. The second plea in effect alleges that the defendants have been defrauded of their acceptance given to a third person for a special purpose; that notice of the fraud was given to the plaintiffs, and that the bill came into the hands of the plaintiffs without consideration. The answer to that plea is the point objected to by the defendants. It is, that after the making of the bill, and before it became payable, it was indorsed to the plaintiffs fairly and *bona fide*, and for a good and valuable consideration, that is to say, for moneys advanced by, and due, and owing to the plaintiffs; and that the plaintiffs had no notice of the fraud. It is in effect a denial that they ever had any notice, and an assertion that they gave full consideration. The question then is, whether a more full statement is necessary of the consideration passing between the plaintiffs and the party from whom they received the bill. I am of opinion that it was unnecessary to state the consideration more distinctly, and that it is sufficient to aver that there was a good consideration. It is true that it might not be sufficient for a count in a declaration, for there greater certainty is requisite; but in a plea it is sufficient that there is a certainty to a common intent. Here any person of good understanding must interpret this in the same way

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as the Court has done, and come to the conclusion that there was a sufficient money consideration passing between the parties, and this seems to me to dispose of that objection. Upon the case itself, I am disposed to go further, and to declare my opinion to be that if the replication had contained merely a simple denial of the allegation of want of consideration, it would have been sufficient. There is a case of common occurrence very similar to this. In an action brought against an executor, in which he pleads judgment recovered, and the plaintiff replies that the judgment was obtained by fraud, it is sufficient for the defendant to traverse the fraud, without setting out more particularly the circumstances under which the judgment was obtained. Upon principle, and upon the facts of the case, therefore, I think that the replication is good, and that the judgment must be for the plaintiff.

PARK, J.—The difficulty in this case arises entirely from the new rules of pleading. Great allowance must be made for generality in pleadings in actions on bills of exchange, otherwise the holders of bills would be put to much inconvenience in suing upon them, and their negociability would be greatly restrained. I concur in the opinion that the third plea is bad, and I also think that a general allegation of consideration would have been sufficient.

VAUGHAN, J., concurred.

BOSANQUET, J.—The third plea is clearly insufficient. I concur in the opinion that has been expressed, that if the replication to the second plea had simply denied that the plaintiffs held the bill without consideration, it would have been sufficient. It is to be observed, that the new rule relating to this subject is couched in a peculiar form. The defendant should have pleaded that the bill was indorsed to the plaintiff by way of accommodation, the plaintiff would then have replied that it was not so indorsed; and it cannot be contended for a moment that, if the pleading had been in this form, it would have been incumbent on the plaintiff to have set out the nature of the consideration he gave for the bill. Because, therefore, the pleadings have assumed a different form, but amounting in effect to the same thing, more is not on that ground to be required of the plaintiff.

Judgment for the Plaintiff.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Easter Term, 1835.

WATSON v. MASCKALL.

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May 12th.

The attorney's right to lien under R. H. T. 2 W. 4, No. 93, extends to costs taxed as between attorney and client.

A RULE had been obtained to review the prothonotary's taxation of costs, upon a question raised upon the construction of *R. H. T. 2 W. 4*, No. 93, which directs that "No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs, in the particular suit against which the set-off is sought." In this cause the prothonotary had allowed the attorney the *taxed costs*, as between *party and party*.

Humfrey, for the attorney, contended that his lien extended to costs as between attorney and client. The rule must be construed to give him the same costs which he would be entitled to deduct out of the fruits of a judgment in the suit, and that clearly extends to costs as between attorney and client. In *Jenkins v. Biddulph* (a), it was held, that extra costs incurred by setting aside an outlawry could not be recovered; but *Best*, C. J. says, "as between attorneys and their clients the case may perhaps be different, because the attorney may have special instructions, which may warrant him in incurring the extra costs." In a case like the present, where the client becomes insolvent, the rule will not effectually give the attorney the benefit of his lien, unless he is held entitled to have his costs taxed as between attorney and client.

Goulburn, Serjt. and *Hayes*, *contra*.—Before this rule, the attorney's lien in this court, was subject to equitable claims existing between the parties. *Figes v. Adams* (b)—[*Bosanquet*, J.—But Lord *Eldon*, when he was Chief Justice, expressed much dissatisfaction with this decision (c).]—In *Sinclair v.*

(a) 4 Bing. 160.
(b) 4 Taunt. 632.

(c) *Hall v. Ody*, 2 Bos. & P. 29.

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Eldred (d), Lord Mansfield said, "that taxed costs are all the costs which the law allows;" and he held that no action could be maintained to recover extra costs beyond those taxed costs. That case was confirmed in *Webber v. Nicholas (e)*, and *Hathaway v. Barrow (f)*.

TINDAL, C. J.—The question is, whether this rule of court gives the attorney a lien for his costs as taxed between party and party; or as between attorney and client. Now, what was the attorney's lien before the rule existed? It is clear, although no express authority has been cited to that effect, that an attorney had a lien upon the judgment, for the whole of the costs incurred in the suit; subject to his bill being taxed as between attorney and client. It is not merely to suits at law that this principle is applicable: for if an attorney prepares deeds, he has a lien upon them for his charges, and no authority has been cited to shew that this right is limited to costs as taxed between other parties it may therefore be taken, that before this rule his lien extended to costs as between attorney and client. That being so, I am unable to give any other construction to this rule than that it entitles the attorney to his lien for costs as between him and his client; subject to the same power of taxation as the client would have had.

PARK and GASELEE, Js. concurred.

BOSANQUET, J.—I am of opinion that the true construction of this rule is, that the attorney shall be placed in the same situation as he would have been, if the fruits of the judgment in the suit had passed through his hands.

Rule absolute (g).

(d) 4 Taunt. 7.

(e) Ryan & Moody, 419.

(f) 1 Camp. N. P. C. 151. See also *Hodges v. Earl of Litchfield*, ante 43.

(g) In *Smith v. Compton*, 3 B. & Adol. 407, which was an action under a covenant for

good title, for costs as between attorney and client incurred in defending the title, Lord Tenterden held, that as the plaintiff had a right to claim an indemnity, he was not indemnified unless he received the amount of the costs paid by him to his own attorney.

April 24th.

CORONE v. GARMENT.

Where a new trial from the Sheriff's Court has been granted at the instance of the plaintiff, who afterwards neglects to re-try the cause, the defendant must take down the record by proviso.

THIS cause had been tried before the sheriff. At the instance of the plaintiff a rule absolute for a new trial had been obtained last *Michaelmas Term*; but since that period the plaintiff had taken no steps to have the cause heard.

Petersdorff moved for a rule calling upon the plaintiff to shew cause why he should not go to trial within one month. If this motion is granted, the defendant will be saved the expense of taking down the record by proviso. As there has been a previous trial, the Stat. 14 Geo. 2, c. 17, which gives judgment as in case of a nonsuit, does not apply (a).

TINDAL, C. J.—If such an application as this had formerly been attended to, the Statute which gives judgment as in case of a nonsuit was unnecessary.

Motion refused.

(a) So held in *Porzelieus v. Maddocks*, 1 H. Black. 101.

DAUBUZ v. RICKMAN.

Com. Pleas.

April 25th.

WATSON had obtained a rule in this cause to review the prothonotary's taxation. The action was in covenant, and four breaches were alleged in the *declaration*. The defendant pleaded several special pleas to each of the breaches: the plaintiff tendered issues to those pleas, *but before the issues were made up or delivered* the parties consented to go to arbitration. The reference was of "all matters in the said suit as specified in the amended particulars;" the costs in the cause to abide the event of the award. The arbitrator made his award to the following effect:—that the plaintiff had sustained damages to the amount of 10*l.*, by reason of the breach for not manuring within one month after mowing; but that in respect of the other causes in the particulars mentioned, the plaintiff had sustained no injury, nor had any cause of action. Upon this award the parties went before the prothonotary, who allowed the plaintiff the costs of the breach found for him, but did not allow the defendant the costs of the breaches which were not proved.

Where a cause is referred to arbitration before issue joined, the Reg. H. T. 2 W. 4, No. 74, must be observed on the taxation of the costs.

Thesiger shewed cause.—This application is founded upon *R. H. T. 2 W. 4, 74*, which directs that "no costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded; and the costs of *all issues* found for defendant shall be deducted from the plaintiff's costs." The defendant cannot maintain that any issues were found for him, for the parties had not come to issue, and the reference is not of any issues joined, but of the matters contained in the particulars of the breaches.

Watson, contra.—The issues were in fact joined, although they were not made up, and the rule clearly applies; therefore the taxation is wrong.

TINDAL, C. J.—If we look at the terms of this reference, the arbitrator has virtually and substantially found three issues for the defendant. Either the plaintiff has no right to any costs for the breach found in his favour, or if he has, then the defendant is entitled to the costs of the other breaches. The prothonotary must review the taxation.

The other judges concurred.

Rule absolute.

RICHARDSON v. POLLEN.

May 12th.

A **JOINT** action against three defendants had been commenced: one was in custody under the writ of *capias*; another had been allowed to put in an appearance to the writ; and the third was detained in custody in *France*, for an offence committed there, but he was expected home in two months. Upon an affidavit of these facts,

A plaintiff will be allowed time to declare, where in a joint action he cannot bring one of the defendants before the Court in consequence of his absence from this country.

Busby moved for time to declare in the action.—The plaintiff cannot declare until all the defendants are in court.

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TINDAL, C. J.—Unless the other defendants consent to put in an appearance for the defendant who has not appeared, your time to plead may be enlarged for two months.

Motion granted.

See *Palmer v. Fiestiel*, 2 Dow. P. C. 507; and *Tidd*, 459, 9th ed.

May 7th.

GRIERSON *v.* AIRD.

A trial will be put off at the instance of defendant from *Easter* till after *Michaelmas* Term, to enable him to obtain the evidence of a material witness.

MELLOR had obtained a rule, on behalf of the defendant, to put off the trial of this cause until the sittings after next *Michaelmas* Term. The affidavits stated, that a material witness to prove a justification to the libel, which was the subject of the action, was at *Nova Scotia*, but that inquiries had been made of his friends in *England*, who stated he was expected home by the end of *November* next.

Busby now objected, that the delay was excessive; and that the affidavits did not give the name of any person of whom inquiries had been made for the witness.

TINDAL, C. J.—That may be supplied if it is material. The motion may be granted; the defendant consenting to give the plaintiff judgment as of *Michaelmas* Term if he succeeds in the action.

Rule absolute.

May 12th.

COOPER *v.* HOLLOWAY.

Where a plaintiff has served a rule to discontinue, and the costs are taxed but not paid, the defendant is not entitled to judgment as in case of a nonsuit.

TALFOURD, Serjt., had moved for judgment as in case of a nonsuit for not proceeding to trial.

Steer shewed cause.—The plaintiff had given a peremptory undertaking to go to trial at the sittings after last term; but he subsequently served a rule to discontinue, and the costs were taxed; the defendant has not applied for the costs, or they would have been paid. By the rule *H. T. 2 W. 4*, 106, the defendant could have signed a *non. pros.* if the costs were not paid within four days; therefore he had no right to apply for the present rule.

Talfourd, Serjt.—The Statute 14 *Geo. 2*, c. 17, enables a defendant, under such circumstances as these, to apply for judgment as in case of a nonsuit.

TINDAL, C. J.—The defendant's attorney must have been aware of these proceedings, and he was not justified in taking this circuitous mode of putting an end to the action.

Rule discharged with costs.

Ex parte LOWERTON.

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BALL moved that an attorney might be admitted upon the usual terms.

The affidavit did not state that the deponent had not practised whilst uncertificated; but admitted that on two occasions he had acted as an attorney, once in having signed judgment on a *postea*, and upon another occasion by signing a consent upon a summons.

An attorney will be re-admitted although upon two occasions he has acted as an attorney whilst uncertificated.

TINDAL, C. J.—The attorney had better have refrained from doing these things.

Motion granted.

WHALLEY v. FOLLOWS.

May 12th.

A RULE for judgment as in case of a nonsuit had been discharged in

Hilary Term last, the plaintiff giving a peremptory undertaking to try at the first sittings in the present term. The plaintiff afterwards took out a summons before a judge at chambers, calling upon the defendant to consent to try before the sheriff of *Middlesex*. The judge ordered the cause to be tried before the sheriff of *Stafford*, and the plaintiff thereupon declined to draw up any rule, and had neglected to try the cause.

Where a peremptory undertaking to try has been given, and default made, a rule for judgment, as in case of nonsuit for non-performance of the undertaking, must be a rule *nisi* only.

Hodges now moved for judgment as in case of a nonsuit, which he submitted, under the above circumstances stated in the affidavit, should be peremptory in the first instance.

TINDAL, C. J.—It can only be a rule *nisi*. The Statute 14 *Geo. 2*, c. 17, requires that notice of the application shall be given.

Rule *nisi* granted.

See *Fokins v. Snell*, 2 Dow. P. C. 411; *Haines v. Taylor*, *ib.* 644.

(Before Mr. J. GASELER.)

NICHOLLS's Bail.

April 27th.

ONE of the bail stated his qualifying property to consist of a sum of money sufficient to indemnify him, which was deposited in his hands by the friends of the defendant.

In justifying for bail where the qualifying property consisted of money deposited in the hands of bail to indemnify him, the qualification was held insufficient.

GASELER, J.—That is not sufficient.

Steer opposed, *R. V. Williams* supported, the bail.

Bail rejected.

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April 16th.

In an action for slander, a writ of inquiry issued in a former suit against the defendant for speaking similar slanderous words, may be received in evidence to prove malice.

JACKSON v. ADAMS.

CASE for slander, tried before *Patteson, J.*, at the last assizes for the county of *Devon*. The words proved were, "who stole the parish bell ropes;" *innuendo*, that the plaintiff, who was churchwarden of the parish, had stolen them. It was proved in evidence, for the purpose of shewing malice, that in *April, 1834*, the plaintiff had brought an action against the defendant for uttering words of a similar import to the above, *viz.*, "The churchwarden of *Stoke Gabriel* once bought a set of bell ropes for 9*l.*, and at a private sale bought them for 2*l.*," and that in this action the defendant had suffered judgment to go by default. The writ of inquiry was produced, by which it appeared that nominal damages had been given; and it was proved that the defendant had made an apology to the plaintiff, in consideration of his agreeing to accept such nominal damages. The jury found a verdict for the plaintiff, damages 5*l.*

Erle now moved for a new trial, upon the ground that this evidence was inadmissible. The plaintiff had received full compensation from the defendant for uttering the words which were the subject of the first action for slander, and the effect of this evidence was to increase the amount of the damages given in the second action. The malicious meaning of the words was not in issue, and this case differs from those cases where such evidence has been admitted, when the words used are equivocal.

TINDAL, C. J.—I see no objection to this evidence being received for the purpose of shewing what the conduct of the defendant had been on a former occasion; the words then spoken were virtually and substantially the same as those which are the subject of the present action. The question to be decided by the jury was, whether these words were spoken maliciously or not? On the first occasion the defendant expressed his sorrow, and admitted that the words were not truly or properly spoken, and this is very conclusive to shew the motives which influenced his conduct.

The other judges concurred.

Rule refused (a).

(a) Upon other grounds a rule *nisi* was granted, to shew cause why a nonsuit should not be entered, or the judgment arrested.

See *Mead v. Daubigny*, 1 Peake, 168;

Lee v. Huson, *ib.* 223; *Warne v. Chadwell*, 2 Starkie, c. 457; *Stuart v. Lovell*, *ib.* 93; *M'Leod v. Wakley*, 3 Car. & P. 311.

May 12th.

DOE dem. BRENNAN, Assignee of ROOPS, an Insolvent,
v. GLENFIELD.

The general assignee of an insolvent debtor under 7 Geo. 4, c. 57, may maintain ejectment to recover copyhold premises, although the assignment of the insolvent's estate to the plaintiff has not been entered on the court rolls of the manor.

EJECTMENT for copyhold premises. At the trial before *Tindal, C. J.*, at the *Middlesex* sittings after *Hilary Term*, a verdict was found for the plaintiff. The plaintiff claimed the premises as general assignee under the *Insolvent Act, 7 Geo. 4, c. 57*, of the estate and effects of one *Roops*, an insol-

vent, under whom the defendant had come into possession. It was not proved at the trial that the assignment of the insolvent's effects, from the provisional assignee to the plaintiff, had been entered upon the court rolls of the manor in which the demised premises were situate (a).

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On a former day, *Talfourd*, Serjt., obtained a rule to enter a nonsuit, in pursuance of leave reserved, upon the ground that the assignment from the provisional assignee to the general assignee ought to have been entered on the Court Rolls.

Scriven, Serjt., and *R. V. Richards*, now shewed cause.—By 7 Geo. 4, c. 57, sec. 11, it is directed, that the insolvent shall, at the time of subscribing his petition, “duly execute a conveyance and assignment to the *provisional assignee* of the said Court, in such form as is to this act annexed, of all the estate, right, title, interest, and trust of such prisoner, in and to all the real and personal estate and effects of the said prisoner, both within this realm and abroad, &c.; which conveyance and assignment, so executed as aforesaid, in form aforesaid, shall *vest* all the real and personal estate and effects of such prisoner, of every nature and kind whatsoever, in the said provisional assignee, and the same shall be made subject to a proviso, that in case the petition of any such prisoner shall be dismissed by the said Court, such conveyance and assignment shall, from and after such dismissal, be null and void to all intents and purposes.” There can be no doubt, and it will not be denied, but that the copyhold estate, which was the subject of this action, was included under this assignment to the provisional assignee. By sec. 19, the Insolvent Court is authorized to appoint an assignee, and the whole estate of the insolvent is then vested in such assignee (b). The following section, upon which the question now before the Court turns, then directs that the assignee shall make sale of the insolvent's estate and effects, “and if such prisoner shall be interested in, or entitled to any real estate, either in possession, reversion, or expectancy, such real estate, within the space of six months after the conveyance and assignment, made to such assignee or assignees in that behalf, or within such other time as the Court shall direct, shall be sold,” &c.; and “in case such prisoner shall be entitled to any copyhold or customary estate, *the conveyance and assignment by such provisional assignee to such assignee or assignees as aforesaid, shall be entered on the court rolls of the manor of which such copyhold or customary estate shall be holden; and thereupon it shall be lawful for such assignee or assignees to surrender or convey such copyhold or customary estate to any purchaser or purchasers*

(a) A memorandum of the assignment to the assignee had been entered on the minutes of the Court Rolls by the steward, and it was argued for the plaintiff that this was equivalent to an entry on the Rolls, but it became unnecessary to give any opinion upon that point.

(b) Sec. 19. And when such assignee or assignees shall have signified to the said court his or their acceptance of the said appointment, the estate, effects, rights, and powers of such prisoner, vested in such provisional assignee as aforesaid, shall immediately be conveyed and assigned by such

provisional assignee, to the said assignee or assignees, in trust for the benefit of such assignee or assignees, and the rest of the creditors of such prisoner, in respect of or in proportion to their respective debts, according to the provisions of this Act: and after such conveyance and assignment by such provisional assignee, all the estate and effects of such prisoner shall be to all intents and purposes *as effectually and legally vested by relation* in such assignee or assignees, as if the said conveyance and assignment had been made by such prisoner to him or them.

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of the same from such assignee or assignees as the said Court shall direct ; and the rents and profits thereof shall be in the meantime received by such assignee or assignees, for the benefit of the creditors of such prisoner, without prejudice nevertheless to the lord or lords of the manor of which any such copyhold or customary estate shall be holden." It is submitted, that under this section the assignment of the copyhold premises need only be entered on the court rolls of the manor, when the general assignee shall proceed to a sale. There is nothing in the Statute to prevent him from maintaining an ejectment before any such entry has been made. By the *eleventh* section, the whole estate of the insolvent vests in the provisional assignee ; and by the *nineteenth* section, it vests by relation in the general assignee. When a Statute declares that property shall absolutely vest, no other act can be necessary to complete the legal title of the party in whom it is declared to vest. If the property did not vest in the provisional assignee by the assignment made by the insolvent, the legal interest would remain in him until the assignment to the general assignee is entered on the court rolls ; and a conveyance made by the insolvent previous to the entry on the rolls, to a purchaser without notice, would in such case be valid, which would manifestly contravene the object of the Insolvent Act. In *Wright v. Fairfield* (c), an extended and liberal construction was given to the Bankrupt Acts. It was there held, that an action to recover unliquidated damages accruing before the bankruptcy passed to the assignees : Lord Tenterden there said, " If it were held that a claim of this kind did not vest in the assignees, the consequence would be, that a right to damages, which would have been highly beneficial to the estate, might be released by the bankrupt." That it was the intention of the legislature to vest the whole of the estate and effects of the insolvent in the assignee, is apparent by the *twenty-eighth* section, which exempts the income of a benefice or curacy from the operation of the previous clauses.

: *Talfourd, Serjt., contrd.*—The title of the plaintiff was not perfected without an entry of the assignment on the court rolls. The *eleventh* and *nineteenth* sections do not operate so as to complete the title of the assignees to the copyhold premises ; for they would not pass by the operation of the word " vest " therein contained. The Bankrupt Acts contained general words of a similar import, and yet it has been held, that a surrender of the copyhold estate by the commissioners was necessary (d).

TINDAL, C. J.—In general, the legal estate in copyhold premises cannot be conveyed without a surrender and admittance. The question in the present case is, whether a new statutory mode of conveying the legal estate in an insolvent's copyhold premises to his assignee, has not been created ; and, looking at the *eleventh* section of the act, it seems to me that such is its effect. The words used are, that " all the real and personal estate and effects of the prisoner " shall vest in the assignee, which undoubtedly includes the copyhold estate ; that such is the case appears clearly by the *twentieth* section, where directions are given for the sale of the insolvent's

(c) 2 B. & Adol. 732.

(d) See sec. 68, 6 Geo. 4, c. 16, and note in *Sturgeon's* 2d ed. 97.

effects; and express mention is made of his copyhold estate. It seems to me, therefore, that the Statute has effectuated a new mode of conveying an insolvent's copyhold estate to his assignees, and that it is only necessary to enter the assignment upon the court rolls of the manor in the event of a sale of the premises, in pursuance of the *twentieth* section. The object to be attained by this entry probably is, to make it appear clear upon the court rolls, how the estate passed to the purchaser, for the conveyance would otherwise seem to have been made to him by a stranger.

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PARK, J.—Taking the *eleventh* and *twentieth* sections of the Statute together, it is impossible to entertain any doubt in this case. The words used in the *eleventh* section are very general, and unless they are sufficient to vest the insolvent's copyhold property in the provisional assignee, it would still remain in the hands of the insolvent. By the *twentieth* section it is clear, that it is upon a sale of the copyhold estate that the entry of the assignment is to be made on the court rolls; the words used are, "and thereupon," which means when the property goes out of the hands of the general assignee. It is observable, also, that the rents and profits of the copyhold estates are "in the meantime" to be received by the assignees for the benefit of the creditors.

GASKLER, J.—If after the assignment to the provisional assignee the prisoner's petition is dismissed, section *eleven* goes on to direct, that the conveyance and assignment shall be null and void to all intents and purposes. If a surrender to the assignee were necessary to vest the copyhold estate originally, the Statute would have directed a re-surrender to be made upon the dismissal of the petition.

BOSANQUET, J.—I am of the same opinion. Nothing can be more general than the words in the *eleventh* section. No entry on the court rolls is there required to be made of the assignment to the provisional assignee, in order to vest the insolvent's copyhold estate; and in the *nineteenth* section we find the same language used to transfer the effects from the provisional to the general assignee. Then comes the *twentieth* section, which directs the sale of the insolvent's property, and contains a special direction as to the copyhold estate, but it is only necessary to enter the assignment on the court rolls, for the purpose of perfecting the title of the person who purchases the copyhold estates.

Rule discharged.

BURT v. WIGLEY.

May 5th.

DEBT on an award. The *declaration* stated that cross actions had been brought between the plaintiff and the defendant, who were attorneys; and that by a Judge's order, made by consent of the parties, it was ordered "that the said two causes should be referred to the determination of Mr. Serjt. C., whether a certain agreement, dated, &c., and a certain assignment of lease dated, &c., or one or both was or were not entered into and executed by the said parties upon some, and what representations, and whether the

Where an arbitrator directed that one party to the submission, might bring actions in the name of the other:—*Held*, that the award was not therefore bad.

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same were unfounded, and to award compensation to the party injured thereby, if the said arbitrator should think fit; and whether the said parties, or either, and which of them had violated the said agreement, and in what particular, and to award compensation if he should think fit for such breach or breaches, and to decide the terms upon which the said agreement was to be cancelled, and also to decide *which of the said parties had a right to receive the bills of costs* for business done for the connexions of the said Wigley; and whether they, and which of them, had improperly or otherwise received any and what sums, and what sums had been respectively received by the said parties from the said business, and whether there was any thing, and what, due to the said parties respectively in respect thereof, or on any other account, after deducting the disbursements and the allowances referred to in the said agreement; if the said arbitrator should think fit, the said arbitrator to decide upon these and all matters in dispute between the said parties, and to award such damages or otherwise as in his discretion he might think fit." The declaration then set forth the other terms in the order, and that the arbitrator duly made and published his award in writing, which was also set forth; the material part of it is as follows:—"And the said arbitrator by his said award, directed that the said agreement should be cancelled, and the several claims of the parties settled on the following terms, that is to say, that the said Burt should retain the said dwelling-house: that all payments and receipts of money on either side, made up to the 6th day of *November* aforesaid, should stand good: *that the said Burt should be at liberty to collect and retain on his own account all sums of money due for business transacted at the office, in Essex Street, and to use the name of the said Wigley, either alone or jointly with his own, if necessary in suing for the same.*" The arbitrator further directed the defendant to pay a certain sum of money to the plaintiff, which was the sum for which the action was brought.

The defendant demurred to the declaration.

Miller, in support of the demurrer.—In this case the arbitrator has exceeded his authority. There is nothing in the order of reference which enabled him to direct that *Burt* might bring actions in the name of *Wigley*. The consequence may be that *Wigley* will be liable for the costs of suits in which the party sued may succeed in obtaining a verdict—at all events, *Wigley* ought to have been protected by a bond of indemnity. Here there is no final settlement of the difference between the parties, but, on the contrary, a door is opened for further litigation.

White, contra, was stopped by the Court.

TINDAL, C. J.—The question upon this case is whether the arbitrator has exceeded his authority; but looking at the order made at *Nisi Prius* and at the award of the arbitrator, it does not appear to me that he has exceeded his authority. It appears that disputes had arisen between *Burt* and *Wigley*, and amongst other matters it was agreed that the arbitrator should decide upon what terms the agreement was to be cancelled, and also which of the said parties was to receive the bills of costs. If the order had only contained the second power, I should have thought it no excess of authority for the arbitrator to direct the actions to be brought in the name of *Wigley*.

but as the arbitrator was to direct upon what terms the agreement was to be cancelled, it very clearly comprehended the power to direct that *Wigley's* name might be used. Then it is said that the award is not final, but the reference was only of disputes existing at the time of the order, and not of disputes which might by possibility arise in carrying the award into execution. It is also objected that a loss might possibly happen to *Wigley*, if *Burt* should fail in any of the actions which are brought; but that applies to events which are merely speculative, and, considered in that point of view, no award could be said to be final. *Wigley* has a very short mode of saving himself from loss, he may come forward and pay the debts himself, and then he can avail himself of such remedies against the debtors as he thinks fit.

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GASKELL, J.—The words used in the order of reference are very large and comprehensive.

VAUGHAN, J.—The authority is clear and express; it directs the arbitrator to find which of the parties has a right to receive the bills of costs. How can he carry his intentions into effect, unless he has power to direct that the name of *Wigley* may be used.

BOSANQUET, J.—I am of the same opinion. In the submission the arbitrator is directed to inquire whether unfounded representations were not made by the party, and if they were, then he was to direct upon what terms the agreement was to be cancelled. The arbitrator finds that misrepresentations were used, and then in the final settlement he directs that *Burt* shall be at liberty to sue for the bills of costs in *Wigley's* name; the liability incurred by *Wigley* in consequence, is a part of the terms upon which the agreement is to be cancelled.

Judgment for the plaintiff.

LEISLE and o^r (Assignees of CUMBERLEGE, a Bankrupt)

May 6th.

v. GUTHRIE.

ASSUMPSIT. The declaration stated that defendant was indebted to *Cumberlege* before he became bankrupt in 2000*l.* for freight payable by defendant to *Cumberlege* for the carriage of goods on board a certain vessel whereof *Cumberlege* was then owner. *Plea*:—That said sum of 2000*l.* was a certain sum of money which became due for freight, payable by defendant for the carriage and conveyance of goods and chattels on board a certain ship called the *Neptune*, of which the said *Cumberlege* then was the owner, upon a certain voyage from the *East Indies* to *England*, being part of a certain voyage taken by the said ship from *London* to the *East Indies* and back to *England* hereinafter mentioned, upon which the said ship at the time of making of the said indenture hereinafter mentioned was bound, and which in the said indenture hereinafter mentioned was recited and mentioned. And defendant further says, that before *Cumberlege* became bankrupt, to wit, on,

1. *A.*, in consideration of money advanced and to be advanced by *B. & Co.*, assigned all the freight to arise from the ship *N.* under any existing or future charter party or other contract, "for or in respect of her then intended voyage to *India* and back to *England*." After the freight had been earned

and ascertained, *A.* became bankrupt:—*Held*, that such assignment was good, and that the assignees of the bankrupt were not entitled to sue for the freight.

2. Notice of the assignment to the defendant being averred—*Held*, that the freight did not remain in the reputed ownership of the bankrupt within the cases decided on 21 Jan. 1, c. 19, ss. 10 & 11.

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&c. by a certain indenture then made between said *Cumberlege* before he became bankrupt, of the first part, and *D. D. Inglis* and Co. of the other part, and which said indenture was duly sealed and delivered by said *Cumberlege*. After reciting that the said *D. D. Inglis* and Co. had lent and advanced the said *Cumberlege* 1,600*l.*, and that the said *D. D. Inglis* and Co. had applied to and requested the said *Cumberlege* to assign over to them the freight and earnings of the said ship *Neptune* on her then present intended voyage from *London* to the *East Indies* and back, and all charter-parties, &c. relating thereto, as collateral security for the due payment of the said 1,600*l.* so lent and advanced to him as aforesaid, and also of all such further sum or sums of money as should or might be due and owing by the said *Cumberlege* to the said *D. D. Inglis* and Co. for costs of insurance and upon the balance of all accounts between them not exceeding in the whole the sum of 3,000*l.*, and which the said *Cumberlege* had consented and agreed to do; the said *Cumberlege*, before he became bankrupt as aforesaid, in pursuance of the said agreement, and for the considerations aforesaid, and of ten shillings to said *Cumberlege* paid by the said *D. D. Inglis* and Co., did bargain, sell, assign, transfer, and set over unto the said *D. D. Inglis* and Co., their executors, &c., all and every the sum and sums of money that then was or were due, or which should or might at any time or times thereafter arise, accrue, and become due, owing and payable to him the said *Cumberlege*, his executors, administrators, or assigns, by any person or persons whomsoever, for or on account of the freight, use, hire, earnings, and profits of the said ship the *Neptune*, under or by virtue of any then existing or future charter party or charter parties, or other contract or contracts, for or in respect of her said then intended voyage to *India* and back to *England*. And also all and every policy or policies of assurance, which then was or were or thereafter might be effected on the said freight or freights; and all moneys which should or might become due and recoverable under or by virtue thereof, together with all charter parties, contracts, agreements, and policies of insurance, relating thereto, and all the right, title, interest, property, benefit, claim, and demand whatsoever, at law or in equity, of him the said *Cumberlege*, of, in, and to the same premises, and every part thereof; To have, hold, recover, receive, take, and enjoy the said sum and sums of money so due or to become due, owing and payable for the freight, use, hire, earning, and profits, of the said ship the *Neptune*, as aforesaid, and all and singular other the premises thereby assigned or intended so to be unto the said *D. D. Inglis* and Co., their executors, &c., in trust that they the said *D. D. Inglis* and Co. did and should in the first place thereout deduct, retain to, and reimburse themselves, the said sum of 1,600*l.*, with interest for the same at 5*l.* per cent., together with all such further sums of money as should or might be due, owing, and payable to them upon the balance of accounts between them and the said *Cumberlege*, and also all such sums of money as might be paid by them for insurance of the said freight or freights, with interest and commission thereon, not exceeding in the whole the sum of 3,000*l.*; and in the next place to pay over the surplus, if any, unto said *Cumberlege*, his executors, administrators, or assigns, or to such person or persons as he or they might appoint to receive the same, and to, for, and upon no other use, trust, intention, or purpose, whatsoever: *whereof he the said defendant, before the said Cumberlege became bankrupt as aforesaid, to*

wit, on, &c. had notice. And said defendant further saith, that from the time of the making of the said indenture, until and at the time when the said freight, in the said declaration mentioned, became due and payable, the said sum of 1,600*l.* so lent by the said *D. D. Inglis* and Co. to said *Cumberlege* as aforesaid, together with interest thereon, amounting together to 1,800*l.*, and certain sums of money paid by the said *D. D. Inglis* and Co. for insurance of the said freight, with interest and commission thereon, and also certain moneys due, and owing, and payable, from and by said *Cumberlege* to said *D. D. Inglis* and Co., upon the balance of accounts between them and said *Cumberlege*, were due and owing from said *Cumberlege* to the said *D. D. Inglis* and Co. All which said moneys amounted together to 2,384*l.* 4*s.* 11*d.* and exceeded the said amount due for freight as in the said declaration mentioned; and which said sums of money before and at the time of the commencement of this suit remained and were and still are due and payable and unpaid to the said *D. D. Inglis* and Co., at the time of the said bankruptcy of said *Cumberlege*, and at the time when the plaintiffs became and were such assignees as aforesaid, and from thence until and at the time when the said freight became due, and until the commencement of this suit, claimed to be and were and still claimed to be and are entitled to receive from the said defendant the said sum of money so due for freight as in the said declaration mentioned, under and by virtue of the said indenture; and this said defendant is ready to verify, &c.

Replication.—That at the time of making the said indenture no charter-party, contract, or agreement, for the said freight, during the voyage of the said ship from the *East Indies* to *England*, and on account of which said 2,000*l.* became payable, had been made, entered into, or agreed upon by said *Cumberlege*, then being the owner of the said ship, and that no freight or money in respect thereof was then due or owing to said *Cumberlege* in respect of said voyage in said indenture mentioned. *Demurrer and joinder.*—Messrs. *Inglis* and Co. were the real defendants in this suit, under an order made in pursuance of the Interpleader Act, 1 & 2 *Wm.* 4, c. 58.

Sir *W. W. Follet*, in support of the demurrer.—The question is, whether the title of the plaintiffs, as assignees of the bankrupt to recover this freight, is paramount to that of Messrs. *Inglis* & Co., who claim under the assignment. It will be contended, that an assignment of the future earnings of a vessel is not valid, and *Robinson v. Macdonnell* (a) will be cited; but that case differs from the present, for the profits there assigned were not in existence actual or potential at the time of the assignment. But that authority need not be controverted to support the defendant's case. Here it is sufficient to contend:—*First*, That the assignment in question is good in equity: *Secondly*, That being good in equity, the bankrupt's assignees cannot object to it, as they are only entitled to the personal estate in which the bankrupt was *beneficially* interested. As to the first point, the case of *Robinson v. Macdonnell*, came before the Court of Chancery, in *re Ship Warre* (b), and Lord *Eldon* there expressed a strong opinion. He says, "I take it to be clear, that if there be an assignment made of the earnings and freight of an existing voyage it is valid, and if that be so of a voyage *in esse*,

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why not of one in immediate *posse*." *Douglas v. Russell* (c) is also a direct authority; there it is held, that the assignment by the owners of a ship, of freight *to be earned*, is good, and that decree was affirmed, on appeal, by Lord *Brougham* (d). Secondly, If it is clear, that the assignment to *Inglis & Co.* is good in equity, the assignees cannot come into a court of law to recover money which equity will take from them again. In *Gladstone v. Hadwen* (e), it was a question whether certain bills passed to the assignees of a bankrupt, and Lord *Ellenborough* there says, "if the property did pass, it was under such circumstances as a court of equity, on a bill filed, would have directed it to be restored. If that be so, we think it would be useless for a court of law to permit that to be recovered which could not be retained one moment. In *Scott v. Surman, Willes*, 402, *Willes*, C. J., says, 'My notion is (and that opinion is confirmed by many authorities cited by Mr. *Durnford* in a note) (f), that assignees under a commission of bankrupt are not to be considered as general assignees of all the real and personal estate of which the bankrupt was seised and possessed, as heirs and executors are of the estate of their ancestors and testators: but that nothing vests in these assignees, even at law, but such real and personal estate of the bankrupt in which he had the equitable as well as legal interest, and which is to be applied to the payment of the bankrupt's debts. And I found this opinion both on the reason and on the justice of the case, and likewise on the several Statutes made concerning bankrupts, which relate to this point. As to the reason of the case, I rely upon the rule concerning circuity of action: for I think it would be absurd to say, that any thing shall vest in the assignees for no other purpose but in order that there may be a bill in equity brought against them, by which they will, be 'obliged to refund and account,' and according to the case of *Burdett v. Willett*, 2 *Vernon* 638, will likewise have costs decreed against them; and so the effects of the bankrupt, which ought to be applied to the discharge of his debts, will be wasted to no purpose whatever." In *Crowfoot v. Gurney* (g), this court also recognized an equitable assignment of a debt. But *Carvalho v. Burn* (h), will be relied on by the other side. There the question was, whether certain cottons passed by an assignment made before the bankruptcy, but in that case the event upon which the property was to be transferred, was uncertain at the time of the agreement, and the amount to be transferred was also uncertain; the contingencies had not happened at the time of the bankruptcy. But here the freight was all earned before the bankruptcy; the amount was ascertained, and it is stated on the plea, that the money due to *Inglis & Co.* exceeded the amount of the freight which had been earned.

Bompas, Serjt., contrd.—An assignment of the future earnings of a vessel is not good at law. That is expressly decided in *Robinson v. Macdonnell* (i). —[*Park, J.*—That is admitted on the other side.]—Here, if the bankrupt had

(c) 4 *Simons*, 524.

(d) 1 *Mylne & Keene*, 488.

(e) 1 *M. & S.* 517.

(f) Lord *Ellenborough* here refers to the following cases: *Esparte Marsh*, 1 *Atk.* 159; *Esparte Butler*, *ib.* 213; *Clopham v. Gallant*, 1 *Com. Dig.* 533; *Howard v. Jennet*, 3 *Burr.* 1369; *Winch v. Keeley*, 1 *D. & E.* 619; *Webster v. Scales*, *M.* 25

Geo. 3, *B. R.* cited *ib.* 622; and *Farr v. Newman*, 4 *E. & E.* 629, *per Grose, J.*; to which may be added *Winch v. Keeley*, 1 *T. R.* 619; and *Carpenter v. Marnel*, 3 *B. & P.* 40.

(g) 9 *Bing.* 372.

(h) 4 *B. & Adol.* 382.

(i) 5 *M. & S.* 228.

sold the ship, he would have sold the right to the freight also, for the right to the freight is incident to the ship. In *Morrison v. Parsons* (j), it was held, that if the owner of a ship having chartered her for a voyage, assigns her before the voyage, though he afterwards assigns the charter party to another; if she earns freight, the assignee of the ship is entitled to the freight as incident to the ship. *Cox v. Davison* (k) is to the same effect. In law there was no assignment of the freight, and the ship remained the property of the bankrupt; the right to the freight, therefore, followed the ship, which clearly passed to the assignees. Here then the property remained in the possession of the bankrupt, and it continued in his order and disposition within 21 Jac. 1, c. 19, s. 10 and 11 (l*). In *Ex parte Monro* (l), where a bond debt was assigned by the obligee and delivered to the assignee, but no notice of the assignment was given to the obligor before the bankruptcy, it was held, that the debt remained in the order and disposition of the bankrupt within that Statute. It may be said, that here notice was given to the debtor; but the assent of the debtor is not averred. Another point arises on *Carvalho v. Burn* (m). There it was held, that inasmuch as at the time of the bankruptcy, the bankrupt possessed a possibility of interest in the thing assigned, from which a benefit to his creditors might result, that the equitable as well as the legal interest remained in him and passed to his assignees. The present case comes within the principle there laid down, for here it does not appear but that more freight might have been earned by the ship during her outward voyage. That case is recognized in *Best v. Argles* (n).

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Follet, in reply.—No answer has been given to the propositions submitted on behalf of the defendant. It is quite clear that equity would have enforced this agreement between the parties. Whether by a sale of the ship the right to the freight would pass, would depend on the notice given. That the ship and freight may, in some cases, be in the hands of different parties, is clear from *Mestaer v. Gillespie* (o). The case cited, *Ex parte Monro* (p), was a case of reputed ownership, for without notice to the obligor, the obligee might have obtained payment of the debt; and the assignment was not there, as here, under seal; nor does that case determine that the assent of the debtor to the assignment is necessary. Here notice to the defendant is expressly averred and the assignment was under seal; nor is it a case where the equity between the parties is doubtful, as in *Best v. Argles* (q), but a complete assignment was made before the bankruptcy.

Cur. ade. vult.

TINDAL, C. J.—The question argued in this case before us, was, whether upon the facts stated in the pleadings, it appears the right to the freight for which the plaintiffs are suing, did or did not pass to the plaintiffs as assignees of *Cumberlege*; because if either the legal or the equitable right to this freight passed before the bankruptcy to any third person, it is not

(j) 2 Taunt. 407.

(k) 6 M. & S. 79; affirmed, 2 Bro. & B. 579.

(l*) Repealed by 6 Geo. 4, c. 16.

(l) 1 Buck, 300.

(m) 4 B. & Adol. 382.

(n) 2 Cr. & M. 400.

(o) 11 Vesey, 628.

(p) 1 Buck. 300.

(q) 2 Cr. & M. 400.

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necessary to cite authorities to shew that it will not pass to the assignees of the party who has made such transfer, on his becoming bankrupt.

Now the argument that has been urged before us, in order to shew that the equitable right was still in the bankrupt, and passed therefore to the assignees, appears to me to have gone on two distinct grounds; one of which is, that by the case of *Robinson v. Macdonnell* (r) the right to freight that is not then actually in existence, that is, freight to be earned, by some charter party or contract not in existence at the time, cannot be the subject matter of a deed and assignment. That is one ground of the law which is to be found so broadly laid down in one part of the case of *Robinson v. Macdonnell*.

Another ground of objection to the answer set up by the defendant is this; that upon the case of *Carvalho v. Burn* (s) if it appears there is any possible existing right in any surplus, that may come back to the assignees of the bankrupt, that then they must sue for the freight, although they may afterwards be liable in equity to the party claiming under the assignment.

As to the first ground of objection the law is certainly laid down in *Robinson v. Macdonnell*, in the judgment of the noble and very learned person who gives the judgment in that case, that an assignment cannot be good to convey the future earnings of a ship. It is to be observed in the first place, that that is not the only ground on which the Court in giving their judgment relied, it is only put by Lord *Ellenborough* as one of two objections to the operation of the deed of assignment; there are others stated in the proceedings, which afford ground for very reasonable inference, that it would not have the operation contended for, perfectly distinct from that which I am now mentioning. But supposing that to be the ground of objection which the Court relied on, is there no distinction between that case and the present? In the first place that was a case where the words of the assignment were general, extending to all the future earnings of the ship; and therefore Lord *Ellenborough*, in giving his judgment, gives an opinion on this particular case, which brought the matter within the difficulty which in a former case the Lord *Chancellor* had mentioned; namely, the complete separation of the ship from the freight to be earned. In the present case it is not an assignment of the future earnings of the ship, but the deed of assignment states that this was on an intended voyage, upon which the ship was actually bound, and it only purports to be an assignment of the freight which shall be earned on that particular voyage. I certainly think that the doctrine of this perpetual separation of the ship from the freight, which operated on the minds of the Court in *Robinson v. Macdonnell*, is one which would not apply to the present case. But in that case it does not appear very distinctly when the freight was earned. Here it appears distinctly that the freight for which this action was brought, was freight due and payable before the bankruptcy. That appears on the record before us, and therefore it is in effect an assignment which operated before the bankruptcy, upon freight which had then been actually earned and was a debt as between the person whose goods were carried and the master or captain of the ship. In effect it is, therefore, an assignment in its operation of a specific sum of money, which became due before the bankruptcy took place. Giving the

(r) 5 M. & S. 228.

(s) 4 B. & Adol. 382.

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fullest force to the case I have named, and supposing it to apply in its circumstances more clearly than at present it appears to do, has there been no impeachment of the authority of that case with respect to the point brought before our consideration? In a note in 8 Price, in *re Ship Wars* (t), a case which arose out of this very transaction, Lord Eldon says "there is considerable doubt whether that case of *Robinson v. Macdonnell* was meant to apply to any thing further than a legal transfer of the future earnings of the ship." Then comes *Douglas v. Russell* (u), where the Vice Chancellor expressly rules the case as being one in which an assignment of future freight for a debt which is then actually existing, is a good and valid assignment in a court of equity. And therefore as far as my judgment goes I think that *Robinson v. Macdonnell*, on which reliance has been placed, does not furnish an answer to the action. Now does any objection arise in reference to the cases decided on the Stat of Jac. (v)? The declaration states that after the freight became due, a notice was given before the bankruptcy to the defendant (the party who was to pay the freight) of the transfer having been made, which is the case of the assignment of a debt before the bankruptcy, and notice being given to the debtor that an assignment has been made.

The second question is whether the case of *Carvalho v. Burn* will apply to the circumstances on this record. The doctrine laid down in that case, which was afterwards confirmed in a court of error, is, that although the general rule is that an assignment of a chose in action for a valuable consideration shall operate as a transfer in equity, so as to prevent the assignees from taking the legal interest; yet that if there has been some residuary benefit resulting given them, the Court will not reverse the natural order of things, and prevent them from taking the legal interest. But it appears that there is an allegation upon this declaration which puts an end (as it seems to me) to the application of that case. There is an allegation that this assignment was made for the amount of 2,384*l.* 4*s.* 11*d.*, then due to the transferees, and that that this sum of money "exceeded the said amount due for freight as in the said declaration mentioned:" therefore it seems impossible to say there is any resulting or residuary benefit, accruing to the assignees of the bankrupt, and that therefore the assignees of the bankrupt are in a condition to sue. I think therefore under these circumstances there must be judgment for the defendant.

PARK, J.—It is quite unnecessary to go through this case, but I fully agree in what my Lord Chief Justice has said. It appears that every thing which has been urged upon the authority of *Robinson v. Macdonnell*, has been so fully answered, that high as the authority of *Robinson v. Macdonnell* is, yet there is considerable cause, knowing all the circumstances, to entertain some doubt as to that decision. It seems the great question made for the plaintiff was in pressing us with the case *Ex parte Monro* (w); that was a case depending on the Statute of James, and was a question of reputed ownership. It was contended that though here notice is averred in the pleadings to have been given, yet that there was something more to be done, and that it was necessary there should be an assent on the part of the debtor.

(t) 8 Price, 269.

(u) 4 Simons, 524.

(v) 21 Jac. 1, c. 19.

(w) 1 Buck, 300.

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The truth is, that in a case where the assignment is not under seal, probably it might be so; but I do not find that it even goes so far as that. Here however there was an assignment under seal.

In *Ex parte Monro*, the Court held that as it was not under seal notice ought to have been given; it never went so far as to say that even in that case an assent was necessary. Here notice having been given in the case of an assignment under seal, it cannot fall under that class of cases.

GASELEE, J.—I am of the same opinion. It appears by this record there was no surplus, or beneficial interest, to which the assignees were entitled.

BOSANQUET, J.—I am of the same opinion. I think if the subject matter of this action has been equitably assigned, that it did not pass to the assignees under the bankruptcy. Now the assignment in question and the freight which is claimed in this action had accrued due before the bankruptcy. The assignment itself, is an assignment of all such freight as shall become due by the charter party or other contract—by any contract upon the voyage then intended to be made from *London* to the *East Indies* and back to *England*, for which the ship was then bound. This case therefore differs very materially from those which have been mentioned; for the cases cited are those in which an objection is supposed to lie against a legal or equitable title for freight, which was to separate the freight from the vessel for the time to come.

This is an assignment of the freight to be earned on the voyage, for which the ship was actually bound. We find the opinions both of Lord *Eldon* and the present Vice Chancellor on that subject very clearly expressed, that that would amount to an assignment in equity. Then it is said that though it might amount to an assignment in equity, yet unless the whole subject matter was assigned, the legal interest must necessarily pass to the assignees. To make that out the case of *Carvalho v. Burn* (x) is cited. In that case it was very doubtful, whether any particular property was assigned, or what particular portion of that property, and whether there was not necessarily some interest still remaining in the bankrupt, which would be held for the benefit of the creditors, and it was held that the legal interest did not pass, and consequently in a court of law the title of the assignees was established. In this case it appears the action was brought for a debt which accrued due before the act of bankruptcy, and that that debt, and the whole of that debt, as it appears on this record, had been assigned; because it is expressly averred that the amount of the debt then due, and for which the assignment is stated as a security, exceeded the whole amount of the freight that was due. Therefore the whole of the debt for which this action was brought appears to be the subject of this assignment, and this assignment is in terms an express assignment. It appears to me, therefore, that this debt, the subject matter of this action, did not pass to the assignees. And then with respect to the circumstance of its having remained in the possession of the party within the principle laid down in *Ex parte Monro*, I think this cannot be considered as a case of reputed ownership, for long before the bankruptcy, the assignment of this debt had been communicated to the

(x) 4 B. & Adol. 382.

(y) 1 Buck, 300.

debtor himself. There is no ground therefore for saying that any interest passed to the assignees, and our judgment must be for the defendant.

Judgment for the defendant.

Com. Pleas.

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v.
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DICAS v. WARNE.

April 16th.

F. V. LEE applied for a rule for an attachment against the defendant's attorney for non-payment of costs. No personal service of the *allocatur* had been effected, but many inquiries at the house and office of the attorney had been made, and copies had been left at both places, and a servant had stated that she had given the paper left at the house to her mistress, and had afterwards seen it in the hands of her master.—[*Tindal*, C. J.—The servant does not make any affidavit.]—No. In *Green v. Prosser* (a) the Court granted an attachment although the *allocatur* had not been personally served.

The service of an *allocatur* for the payment of costs, must be personal, before an attachment will be granted.

TINDAL, C. J.—You do not say that the party keeps away from his house to avoid the service; with a little more watching you will probably succeed in effecting a regular service. It is only under very peculiar circumstances that personal service can be dispensed with, such as that the *allocatur* has been seen in the hands of the party.

Rule refused.

(a) 2 Dow. Prac. Cases, 99. It was stated at the bar that *Green v. Prosser* had been overruled in the Court of Exchequer. This seems to be the fact. See *Stunnell v. Tower*, 1 Crompt. Meeson & Roscoe, 88, where *Lyndhurst*, C. B. says, "The hearing of the party's voice in the house carries the case no further than this, that he was at home when the daughter was served with

the *allocatur*. The demand upon the daughter is of no avail. It is much better in cases of this kind, where the liberty of the subject is so deeply concerned, to adhere to the strict rule that personal service should be required. The Court is more anxious to lay down this rule, as the case cited [*Green v. Prosser*] might be supposed to authorize a less strict practice."

SCALES v. EAST LONDON WATER WORKS CO^y

May 1st.

TADDY, Serjt. moved to set aside an award. The plaintiff had brought an action and filed a bill in Chancery against the defendants, for damages sustained in consequence of certain water pipes being laid down upon his premises: and all matters in dispute being referred to an arbitrator, the arbitrator had directed both suits to be discontinued, and he awarded the plaintiff the sum of 200*l*. It was now set forth by the affidavits that the costs incurred by the plaintiff in repairing the damage caused by the defendants exceeded 1000*l*., and that a witness examined before the arbitrator, who had been employed by the plaintiff to repair those damages, had sworn that 200*l*. would cover all the expenses incurred; whereas in fact the witness had been paid a much larger sum by the plaintiff; and the same witness stated to the arbitrator, that the plaintiff had requested him to make out false accounts for the purpose of defrauding the defendants. This witness had also been heard to say, that if the plaintiff did not give him 200*l*. he would spoil his cause.—[*Park*, J.—Was this proved before the arbitrator?—It was not. Another ground for the present application is, that the arbitrator had refused to

An award will not be set aside although the affidavits in support of the application disclose strong imputations upon the testimony of a material witness who was examined before the arbitrator; nor is the arbitrator bound to examine a party in the cause who could have contradicted the witness.

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examine the plaintiff, who could have totally contradicted the statements of the witness.—[*Park, J.*—What powers had he to examine him?—By the terms of the rule it was in his discretion, and this is a case in which he ought to have examined the plaintiff.

TINDAL, C. J.—We have no power to interfere in this case. By the terms contained in the order of reference it was in the discretion of the arbitrator to examine either of the parties, but still he might not have thought it quite right to examine the plaintiff. There is certainly a very wide difference between the sum awarded, and that which is said to have been expended; but, we think the arbitrator could not have awarded the smaller sum, unless some strong proof had been offered him. The declaration made by the witness ought to have been proved, and then I agree that the arbitrator must have proceeded cautiously before he implicitly relied on his evidence. At this moment, if the witness has forsworn himself, the plaintiff is not without remedy against him, but it would be setting a mischievous example to interfere at present.

PARK, J.—By the late act (a) proceedings may be taken against the witness for perjury.

The rest of the Court concurred.

Motion refused.

(a) 3 & 4 Wm. 4, c. 42, sec. 41.

May 12th.

ORAM v. SHELDON.

A claimant did not appear to a sheriff's rule under the Interpleader Act, the Court held, that neither the sheriff nor the execution creditor were, under the circumstances, entitled to costs.

DENMAN WHATLEY had obtained a rule on a former day, under the Interpleader Act, 1 & 2 Wm. 4, c. 58, sec. 6, calling upon an execution creditor and a claimant, to come before the Court for the adjustment of their claims to property taken by the sheriff under a *fi. fa.*

Hodges now appeared on behalf of the execution creditor, and produced an affidavit which stated that on the 28th of April the claimant's attorney, in the presence of the claimant, had expressed his intention of abandoning the claim, and that he did not intend to appear to the Sheriff's rule.

Whatley asked for the sheriff's costs. In *Philby v. Ikey* (a), the sheriff was allowed his costs when the claimant did not appear.

TINDAL, C. J.—The sheriff is well off without being paid any costs.

Hodges.—At all events the execution creditor is entitled to be paid his costs by the claimant, and it is the usual practice to allow them when the claimant does not appear. Here the claim was altogether abandoned.—[*Tindal, C. J.*—You need not have appeared after the notice you received.]—We were brought here by the sheriff's rule.

(a) 2 Dow. P. C. 222.

TINDAL, C. J.—I think no costs ought to be allowed.

The other judges concurred.

Rule accordingly (b).

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(b) See, as to when costs are allowed under this Statute, *Bowdler v. Smith*, 1 D. P. C. 417; *Ford v. Dillon*, 2 Nev. & Man. 663; *Briant v. Hey*, 1 D. P. C. 428; *Perkins v. Burton*, 2 D. P. C. 108; *Tomlinson v. Done*, 1 Harr. & Woll. 123; and *Dabbs v. Humphrey*, ante 4.

BOURDIEU v. ROWE.

May 9th.

A RULE had been obtained for the examination of a witness upon interrogatories under Stat. 1 Wm. 4, c. 22, upon a new trial of an issue which had been sent to this Court, out of the Court of *Chancery*.

A witness may be ordered to be examined upon interrogatories, under 1 Wm. 4, c. 22, upon the trial of an issue directed by the Court of Chancery.

Watson.—This is an issue, sent to this Court a second time by the Vice Chancellor, and the Statute only refers to “actions which are depending in courts of law.”—At all events the application should be made to the Vice Chancellor, especially as the witness sought to be examined was not examined upon the first trial of the issue, or in the course of the suit in equity.

Per Curiam.—As this issue has been sent to this court, it will be tried in the ordinary way. This is like an application to put off the trial, which must certainly be made to this court and not to the Vice Chancellor.

Rule absolute.

(Before Mr. J. PARK.)

BOYD'S Bail.

May 9th.

BALL opposed the bail, and objected that the form of affidavit required by *R. T. T.*, 1 Wm. 4, and *R. H. T.*, 2 Wm. 4, had not been observed. The affidavit was, that deponent was worth a sufficient sum “over and all above his just debts.”

In justifying bail, the form of affidavit given in *R. T. T.*, 1 W. 4, need not be strictly followed, and where only one kind of property is described, the value sufficiently appears in the previous part of the affidavit.

PARK, J.—That is sufficient.

Bail, after the bail had justified, submitted that the defendant was not entitled to the costs of justification, the affidavit not being in the form required by *R. T. T.*, 1 Wm. 4, No. 3, which requires the bail to state the value of the property.

Archbold, contra.—Here there is only one property described, and the bail has stated in the affidavit, that she is worth a sufficient sum, and that her property consists of a freehold house, situate, &c.; the value of the property is therefore in fact stated.

PARK, J.—If several kinds of property had been described, then the

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objection would be valid: but, as only one description of property is mentioned, I think it is sufficient.

Bail allowed.

(Before Mr. J. GASELEE.)

May 12th.

HIGGIN'S Bail.

Where it was sworn that bail justifying by affidavit, was an infant, time may be given the other party to answer, without payment of costs.

JUSTIFICATION of bail by affidavit. *Barstow* produced two affidavits shewing that one of the bail was an infant.

GASELEE, J.—Then the matter must stand over for inquiry.

Barstow asked for the costs of the opposition.

GASELEE, J. refused to give costs, saying the objection might ultimately prove to be taken without any foundation in fact.

Comyn supported the bail.

Time given without costs.

BARNETT v. GLOSSOP.

Assumpsit for the copyright of a play. *Plea, non assumpsit.* Held, that it could not be objected that the assignment was not in writing, but that it ought to have been specially pleaded.

ASSUMPSIT to recover 20*l.* for the sole right of acting a dramatic piece, called "*Victorine*," bargained and sold by the plaintiff to the defendant, with a count upon an account stated. *Plea, Non assumpsit.*—The cause was tried under a judge's order, before the Secondary of *London*. Verdict for the plaintiff for 13*l.* 4*s.* In *Hilary Term* last, *Thomas* obtained a rule *nisi* to set the verdict aside and enter a nonsuit, upon the ground that it was not proved at the trial that the assignment of the copyright was in writing, which he contended was necessary, under Stat. 8 *Anne*, c. 19, & 3 & 4 *Wm.* 4, c. 15, citing *Power v. Walker* (a), and *Clementi v. Walker* (b). The Secondary held at the trial that the objection could not be taken under the plea of *non assumpsit* (c).

Dowling, for the plaintiff, now shewed cause.—He was stopped by the Court, who called upon *Thomas* to support his rule, upon the question, whether the objection ought not to have appeared upon the record.

Thomas.—The rules of pleading (d) do not call upon a defendant to plead such a defence as is here set up. By 55 *Geo.* 3, c. 194, s. 21, and 6 *Geo.* 4, c. 133, s. 5, no apothecary shall be allowed to recover his charges unless he shall prove at the trial that he has obtained a certificate (e). Could not a defendant sued by an apothecary object that this proof was not given, although he had only pleaded *non assumpsit*? So here, the plaintiff had no

(a) 3 M. & S. 7.

(b) 2 P. & C. 886.

(c) Upon applying for this rule, *Thomas*, who had conducted the defendant's case before the secondary, was permitted to state the facts which had occurred, and the Court intimated that when counsel could speak to

the facts, the notes of the judge need not be produced upon moving a rule *nisi*.

(d) R. H. T. 4 W. 4.

(e) This and other instances are collected, in an edition of the new rules by Bosanquet, pp. 51, 52, which was read in the course of the argument.

legal right to recover in this action, unless he shewed that the contract was in writing.

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TINDAL, C. J.—I think upon the true construction of the rule which has been referred to, that the answer set up against the plaintiff's right to recover should have been put upon the record. The rule states, that "in all actions of assumpsit, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact, from which the contract or promise alleged may be implied by law (*f*).” Here the action is brought to recover a sum of money for a right to represent a dramatic piece bargained and sold, and the answer set up on the plea of *non assumpsit* is, that the law requires that the assignment should be in writing. Now this does not operate as a denial in fact, but it is a denial in law. By the third example to the rule, it is provided that "in every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded.” Now what is this defence but a plea, that a provision required by the construction put upon certain Statutes, has not been complied with? and, I think, that the defendant not having pleaded it, he could not take the objection.

PARK, J.—The difficulty in this case has arisen by calling the plea of *non-assumpsit* a plea of the general issue, but there is no longer any such plea as the general issue, except where it is given by particular Statutes. The third example which is given to the rule in question points out, that whatever makes the contract void or voidable in point of law, must be specially pleaded. The purpose intended by these rules is, that parties shall not be taken by surprise, or be ignorant of the defence which is to be relied on, but this purpose would be defeated if we were to say that it is unnecessary to plead the defence now set up.

GASELEE, J.—I think this defence ought to have been specially pleaded; it is not necessary to consider the cases which have been cited, for the purpose of shewing that the assignment ought to have been in writing.

BOSANQUET, J.—I am of the same opinion, and I should have been extremely sorry to come to any other conclusion, for the great object intended by these rules, was to provide that all legal defences should be specially pleaded; and the exceptions which are still to be found, are those where the general issue may be pleaded, by virtue of an Act of Parliament. In other cases the plea of the general issue is certainly at an end. In assumpsit, the plea of *non assumpsit* is confined to a denial of the matters of fact, from which the contract or promise may be implied by law. If the denial consists of a matter of law, it ought to be pleaded. Here it is objected that the Statute of *Anne* makes a writing necessary, which is a defence in law. In one of the examples to the rule, illegality of consideration, either by Statute or common law, is required to be specially pleaded, which is an illustration of the extent to which it was intended that the rule should apply. Rule discharged.

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April 30th.

What documents a party will be required to admit under R. H. T. 4 W. 4.

SMITH v. G. R. BIRD, the elder, and G. R. BIRD, the younger.

AFTER plea pleaded in this cause, the plaintiff served the defendants with a notice in the form directed in *R. Hil. T. 4 Wm. 4*, calling upon them to inspect and admit the following documents :—

DESCRIPTION OF THE DOCUMENTS.

"No. 1. Letter from the defendants to Mr. *Cyrus Jay*, the plaintiff's attorney, sent by post, dated *Birm., Nov. 16, 1832*.

2. Letter from the defendants to Mr. *Cyrus Jay*, sent by post, *Birm., Dec. 20, 1832*.

3. An account headed Mr. *Samuel Smith*, Dr. to *G. R. Bird* and son, canal carriers and wharfingers ; its amount 21*l.* 11*s.* 5*d.*

4. The receipt of *Van Picyenbrock* at the side thereof.

5. Letter written by the defendants, *G. R. Bird* and son, to the plaintiff, and sent by post, *Birm., Aug. 4, 1831*.

6. Letter written by *George Williamson* for *Thomas Worthington*, addressed to the plaintiff, and sent by post, *Manchester, Oct. 2, 1832*.

7. And also the invoice contained therein.

8. Letter from *James Goodman*, of *Northampton*, to the plaintiff, and sent by post, *Aug. 23*.

9. And also the invoice therein.

10. Letter written by *James Goodman*, of *Northampton*, to the plaintiff, and sent by post, *Dec. 6, 1832*.

11. Copy of defendants' bill—of the receipt of *Van Picyenbrock*, and the certificate thereof by *Van Kelen*, notary public of *Brussels, Nov. 13, 1832*.

12. A declaration in *French*, signed by *T. Defrenne*, dated *Brussels, April 12, 1833*.

13. Letter from *Van Picyenbrock* to Mr. *Defrenne*, dated *Brussels, Feb. 21, 1832*.

14. Minutes of judgment of the tribunal of First Instance, sitting at *Brussels*, in the matter of *Saml. Smith* (the now plaintiff), a merchant there, and *Jean Baptiste Van Picyenbrock*, in *French*, and a translation thereof in *English*.

15. Copy of a letter written by *James Guest* and sons, of *Birmingham*, dated *Birmingham, May 27, 1833*, to Monsieur *Van Picyenbrock*, of *Brussels*, registered in that city, and made an attested copy by *Van der Kelen, Brussels, April 18, 1832*.

16. The receipt of *Van Picyenbrock* to the plaintiff for 128 florins on account of *G. R. Bird* and son, the defendants to this action, *Brussels, April 18, 1832*."

The defendants consented to admit the letters numbered 1, 2, and 5, and also the account numbered 3.

Upon the question whether the defendants were bound to admit the remaining documents, a summons was attended before Mr. Justice *Gaselee*.

but that learned judge directed the parties to make a motion to the Court upon the subject.

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v.

BIRD.

Bompas, Serjt., for the plaintiff, now moved accordingly.—The object of the rule of court under which the defendants are required to admit these documents, was to save expense, and the defendants cannot possibly sustain any injury by complying with the terms of the notice. The originals of the foreign documents are filed in the court at *Brussels*, and it will be a saving of great expense to the parties if some person in *Brussels* is directed to examine the copies with the originals, for otherwise a witness must be brought over from *Brussels*. As to the receipts mentioned, those are given by the defendants' agent, and the fact of his being an agent is not denied on the other side.

Goulburn, Serjt., appeared to oppose the application.—He contended that the Court had no jurisdiction, as the rule of Court directed the application to be made to a judge.—[*Tindal*, C. J.—We shall merely give our opinion to the judge who desires to obtain it, and then he will act upon it hereafter, and indorse the summons accordingly.]—This is not a reasonable application. The defendants are called upon to admit documents which are written by persons about whom they may be supposed to know nothing. As to the receipts said to have been given by the defendants' agent, there is no agency established. At all events the rule never contemplated foreign documents like those which are stated in the notice. They appear to refer to a totally different suit.

The Court gave no opinion upon the motion, but directed a further application to be made to Mr. Justice *Gaselee* at chambers, who subsequently made the following order:—

“Upon hearing the attorneys or agents on both sides, and by consent, I order that the defendants do hereby admit upon the trial of this cause the documents numbers 3, 5, and 15, mentioned in the notice hereunto annexed; and I further order (it appearing to me unreasonable that the said defendants should admit the documents numbers 6, 7, 8, 9, and 10, also mentioned in the said notice hereunto annexed), that the costs of proving the said documents upon the trial of the said cause shall abide the event of the said cause. And I further order, that the said defendants shall have one fortnight's time to inspect at *Brussels* the documents numbers 4, 11, 12, 13, 14, 16, also mentioned in the notice hereunto annexed, and that the plaintiff do pay the costs occasioned by such inspection, to be taxed by the prothonotary. And I further order, that in the event of the said defendants not admitting the said documents after such inspection, the costs of proving the said documents, provided the same shall be proved upon the trial of the said cause to the satisfaction of the judge, to be certified by his indorsement, shall be paid by the said defendants, whatever may be the result of the said cause.” Dated, &c.

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April 30th.

FANCOURT v. BULL.

1. In trover for a bill of exchange defendant pleaded that before the conversion, *A.* was lawfully possessed of the bill, and that he indorsed it to *B.*, and that *B.* for a valuable consideration, indorsed it to the defendant. The replication took issue upon the averment of consideration; which was found for the plaintiff:—*Held*, that by this plea the title of the plaintiff was admitted, and that the defendant was not entitled to arrest the judgment upon the ground that the title appeared to be in *A.*—*Held* also, that defendant was not entitled to a replesder.

2. Where the drawer of an accommodation bill misapplied the bill, and the acceptor brought trover to recover it from a third party, to whom the drawer had improperly paid it away:—*Held*, that the drawer was a competent witness to support the plaintiff's case.

TROVER for a bill of exchange for 350*l.*, drawn by one *Hugh Fraser*, upon, and accepted by, the plaintiff.—The defendant pleaded, *First*, Not Guilty. *Secondly*, That said bill of exchange before and at the time of the delivery thereof to the defendant, as next thereafter mentioned, was in the possession of *Fraser*, who was the drawer thereof, and the person to whose order the same was made payable, and that the same had been and then was duly indorsed by the said *Fraser*, and also by one *Palmer*. That before and at the time of such delivery of the said bill of exchange to defendant as aforesaid, one *S. Solomonson* and said *Fraser* were indebted to said defendant, in the sum of 300*l.*, and thereupon and long before the said bill of exchange had become due, to wit, &c., the said *Fraser*, in consideration thereof, and also in consideration of a certain further sum of money, to wit, the sum of 60*l.*, then lent and advanced by the defendant to said *Fraser*, at his request then delivered the said bill of exchange so indorsed as aforesaid to the defendant, for the purpose of securing to defendant the repayment of the said several sums of money; by means of which said premises the defendant then became and was the lawful holder of the said bill of exchange.

Third plea.—That before the time of the supposed conversion of said bill of exchange, in said declaration mentioned, the said *Fraser*, who was the drawer thereof, and the person to whose order the same was made payable, was lawfully possessed of the same; and being so possessed thereof, the said *Fraser* indorsed the said bill of exchange to the said *Palmer*; and the said *Palmer*, before the said bill of exchange had become due, to wit, &c., for a good and valuable consideration in that behalf indorsed the same to the defendant, by means whereof defendant became the lawful owner thereof.

Replication. To *first* plea, *Similiter*.—To *second* plea, That said *Fraser* received said bill of exchange in said declaration mentioned, and until the said defendant became possessed thereof held the same for a special purpose, for the sole use and benefit of the plaintiff, and not otherwise, to wit, for the purpose and in order that the said *Fraser* might get the said bill of exchange discounted for the plaintiff, and deliver and pay the proceeds thereof upon such discounting to the plaintiff, of all which the defendant at the time he received the said bill of exchange, had notice. That the said *Fraser*, in violation of good faith, and contrary to the purpose for which he received the said bill of exchange, deposited the same with the defendant, as in the said second plea is alleged; and the defendant took and received the said bill of exchange, well knowing, and with notice of all the said premises, and that the plaintiff hath not received any value for the said bill of exchange; concluding with a verification.

To *third* plea.—That there never was a good or valuable consideration for said *Palmer* indorsing said bill of exchange to defendant in manner and form as defendant hath alleged, and this the plaintiff prays may be inquired of by the country, &c.

Rejoinder to the *Replication* to the *second* plea.—That defendant had not, at the time he received the said bill of exchange, any knowledge or notice that the said *Fraser* had received or held the said bill of exchange, for the

special purpose in the said replication mentioned, for the use and benefit of the said plaintiff, or that said *Fraser* deposited the same with him, the said defendant, contrary to the purpose for which said *Fraser* received the same, or that said plaintiff had not received any value for the said bill of exchange. *Rejoinder to the Replication to the third plea similiter.*

At the trial before *Tindal, C. J.*, in *London*, at the sittings after last *Michaelmas Term*, *Fraser*, the drawer of the bill, was examined on behalf of the plaintiff, after an objection taken to his competency, which was overruled by the learned judge. The jury being satisfied that the defendant had notice that *Fraser* had no right to part with the bill for his own purposes, found a verdict for the plaintiff for the damages laid in the declaration, subject to its being reduced to one shilling upon the bill being returned. They also found that no consideration passed between *Palmer* and the defendant.

In *Hilary Term*, *Coleridge, Serjt.* obtained a rule, calling upon the plaintiff to shew cause why there should not be a new trial, upon the ground that the evidence of *Fraser* was improperly admitted; or why upon the state of the pleadings, the judgment should not be arrested, or a repleader awarded.

Stephen, Serjt., and *Martin*, now shewed cause.—First, As to the admissibility of the evidence. *Fraser* was not incompetent on the ground of interest. Whether the plaintiff or the defendant succeeded in the action, was a matter of indifference to him, for his interest was equal. If the plaintiff obtained a verdict, then the debt due from *Fraser* to the defendant would revive. If, on the other hand, the defendant should successfully defend the action, then the plaintiff could sue *Fraser* for the amount of the *lien* set up on the bill by the defendant, in consequence of *Fraser's* misconduct. It will be objected, that if the defendant obtains a verdict, *Fraser* would in that case be liable to the plaintiff for the costs of the action, and that the balance of interest would be thereby destroyed. But no authority can be cited to shew that he would be liable to pay such costs. The plaintiff had no right to bring an action of trover, without evidence whereby to obtain a verdict. But admitting that he could be sued for such costs, that would not disqualify him; for, by stating that he had misapplied the bill, he would speak against his own interest. In *Carter v. Pearce (a)*, it is said, “that the bare possibility of an action being brought against a witness is no objection to his competency;” and *Buller, J.*, added, “that in order to shew a witness interested, it is necessary to prove that he must derive a certain benefit from the determination of the cause one way or another.” Secondly, It is said that an immaterial issue is taken by the replication to the third plea, which has been found in the plaintiff's favour; and that upon the face of the pleadings it appears, notwithstanding the verdict, that the bill is the property of *Palmer*. But this is not so, for the defendant sets up a title in himself paramount to that of the plaintiff, at the same time confessing that the property is in the plaintiff and not in *Palmer*. That clearly appears in *Comyns v. Boyer (b)*, which is precisely applicable. There it was held that a justification in trover—that the goods were bought in market overt, impliedly confessed the allegation that they belonged to the plaintiff. But here the traverse taken is perfectly good, and the supposed defect is a fallacy arising from

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(a) 1 T. R. 163.

(b) Cro. Eliz. 485.

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confounding a bill of exchange, which is a negotiable instrument transferable by one who has not the property in it, with a chattel which cannot be transferred, except by the person who has the property. The plea is a special plea of property in the bill. The only allegations in it with respect to *Fraser's* or *Palmer's* interest in the bill are, that they have such an interest and such a possession as enabled them to transfer a title to a holder for value. Now, a person who has stolen a bill, or who is fraudulently in possession of it, may transfer such a bill, *a fortiori*, therefore may an agent of the plaintiff who has the rightful possession so transfer it. All that the plea avers in respect to *Fraser* and *Palmer* is, that they have such possession as enables them to transfer the bill to defendant for valuable consideration, and such a possession is quite consistent with the property, and also the right of possession being in the plaintiff; for a man who has delivered goods to a bailee or agent, and so parted with the actual possession, may maintain trover. *Wilbraham v. Snow* (c). But suppose that the issue here taken was immaterial, it would be no ground for arresting the judgment; the utmost extent of the application must be for a repleader.—[*Tindal, J.*—It is a general rule with respect to a repleader, that it is not granted on the request of the party who made the first default.]—Exactly so. Here the defendant clearly brought us into error by his plea. In *Symmers v. Regem* (d), Lord Mansfield puts the same proposition: he says, "The next objection is, that *Marshall* and *Grabb* claim to be freemen under the act of parliament and not by election, and therefore the issue as to them is an immaterial issue, being joined on the election. The answer to that is, the defendants themselves have put it so, and call their admission by the corporation an election. Therefore the defendants themselves have led the prosecutor into the mistake, if any, by calling their admission an election. That objection therefore has no weight." Another ground is, that a repleader is never awarded unless complete justice cannot be answered without it. *Goodburne v. Bowman* (e).—[*Park, J.*—It is also so laid down in the case in *Cowper* (f).

Kelly and *Swann*, for the defendant.—First, *Fraser* was an incompetent witness. It is not necessary to maintain that his incompetency depends upon being liable to the plaintiff for costs. But he was clearly interested in the recovery of the bill. The facts are these: the bill was intrusted to the witness for a special purpose, and he parted with it for another purpose; therefore he was liable to be sued by the plaintiff for the damages consequent upon his wrongful act. If the defendant had recovered, he could call upon the plaintiff to pay him to the extent of the lien which he claimed on the bill, which was less than its full amount. In that case *Fraser* would only be liable to the plaintiff for the same amount. But it was possible that the bill might have passed out of the hands of the defendant, and have come without notice into the possession of a party, under such circumstances, as to enable him to recover the whole amount of the bill from the plaintiff. In that case, the witness would be also liable to repay the plaintiff the whole amount of the bill, and therefore it was clearly to the interest of *Fraser* that the plaintiff should succeed in the action of trover, and thus escape the possi-

(c) 2 Saund. 47 b.

(d) Cowper, 501.

(e) 9 Bing. 543.

(f) *Symmers v. Regem*, Cowper, 501.

bility of being called upon to repay the larger sum. It may be also material to remark, that by the second plea the defendant sought to retain the bill, partly for a debt due from *Fraser* and *Solomonson*, and consequently, if the plaintiff recovered in this action, that debt would be revived, and then *Fraser*, the witness, would only be liable to pay jointly with *Solomonson*. As to the second point, the plea shews a good answer to the declaration, and the replication has taken an immaterial issue; therefore the plaintiff is not entitled to retain his verdict. Any lawful possession shewn by the defendant, through a party having a good title, would be a sufficient answer to the declaration. Here it was immaterial whether any consideration passed between *Palmer* and the defendant; for *Palmer's* title remains unanswered, nor can the facts found at the trial, or the contents of another plea upon the record, be prayed in aid. The title of the plaintiff is replied to by shewing a title in *Palmer*, and it is averred that *Fraser* indorsed the bill to *Palmer*, which means that he so indorsed it as to give him the property in it. This allegation might have been put in issue by the plaintiff, but as the pleadings stand, it is not disputed that there was a good consideration from *Fraser* to *Palmer*, and it is not necessary that the defendant should aver that fact.

Cur. adv. vult.

TINDAL, C. J.—In this case the defendant obtained a rule to shew cause why the verdict should not be set aside, on the ground of there being an improper admission of evidence; or why judgment for the plaintiff should not be arrested and a repleader awarded. With regard to the first objection, we see no ground of interest, as far as *Fraser* is in the suit, so as to render him an incompetent witness. The defendant claims to retain this bill on account of the debt of *Fraser*, for which he alleges it to have been given to him. If the plaintiff succeeds in this action, that debt will immediately revive, and the defendant may recover it in an action against the witness. If the plaintiff fails in the action, he will be able to recover against the witness the amount of damage he has sustained by the wrongful delivery of the bill, that is, the amount of the lien the defendant has obtained on the bill. He appears to stand indifferent between the parties, for as to the costs of this action, there seems no principle on which the witness can be held liable to the costs. If the plaintiff has brought an action of trover for his bill, and is unable to prove his title on account of a legal objection, or the want of sufficient evidence, he must bear the expenses himself, he never can state them as against the witness.

The application to arrest the judgment is a matter of greater nicety and difficulty; it proceeds on the ground, that notwithstanding the traverse raised on the third plea is found for the plaintiff, still enough remains unanswered in that plea to form a legal answer to the plaintiff's demand. If this be a proper construction of the plea, the result undoubtedly is, that the plaintiff cannot be entitled to the judgment of the Court. But looking to the claim of the plaintiff, as stated in his declaration, and the answer which is given by the defendant in his third plea, we think the allegation in his third plea does not amount to a legal answer to the action. It is an action of trover, in which the plaintiff states the defendant to be in possession of a bill, which he states is his property, and that the defendant converted it to

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his own use. The third plea states a special property in the defendant; a defence which must be pleaded specially. The question in pleading is reduced to this, whether the facts stated amount to an avoidance of the plaintiff's right of action, by shewing the property in the bill to be out of the plaintiff. That the special plea admits not merely the right of possession, but the property of the bill, to be in the plaintiff, is clear, from the decision of the Court, in *Comyns v. Boyer* (g), in which the defendant pleaded in bar to trover for nine oxen; that "one *William White* was possessed of these oxen, and sold them to the plaintiff in market overt. One objection thereupon by the plaintiff on demurrer was, that the plea did not confess, because the declaration supposeth the property of these goods to be in the plaintiff, and the defendant doth not confess nor deny it, nor answer thereto: but the Court held the plea was good enough as to that, for when he justified by buying in market overt, it is thereby allowed, that the property was in the plaintiff, but that he was bound, by that sale, and he needed not otherwise confess it." The plaintiff, therefore, being admitted by the plea to be the lawful owner of this bill, it affected to deprive him of that property, by alleging that *Fraser* became lawfully possessed of it, and indorsed it over to *Palmer*, and *Palmer* to the defendant, without alleging that *Palmer* took the bill for a valuable consideration; but we are of opinion, that this is not sufficient. All the facts alleged in the plea may be perfectly true, yet the property in the bill remain unaltered in the plaintiff; for these facts are consistent with the loss of the bill by the plaintiff and the finding of it by the defendant, or the delivery of the bill to *Fraser* for some special purpose; but in neither of those cases could it have been given in evidence, that it belonged to a third person as against the plaintiff. In order to give this title, the indorsee must have given value for the bill without notice of the defect in *Fraser's* title. It is urged, that in a declaration of trover for a bill of exchange, it is sufficient to state an indorsement, without an allegation that it was for good consideration. This is undoubtedly the case where the holder is enforcing his remedy on the bill which has been in a due course of circulation: but here the action is brought to recover the property in the bill, not to enforce its payment. The plaintiff alleges his title, and challenges the defendant to disprove it, or prove a better. It is manifest, that this bill was not in a course of circulation; for the plaintiff alleges, that he was the owner of the bill, that it was drawn by *Fraser* and accepted by the plaintiff; and such a bill would not be the property of the acceptor, but of the drawer or indorsee; to revest such a title out of the plaintiff, something more than a mere indorsement must be stated. In *Comyns v. Boyer*, a sale in market overt was held a sufficient allegation to divest the property from the plaintiff; for a sale in market overt was a title against all the world: but here a lawful possession and indorsement, which had been an indorsement without knowledge of the plaintiff's title, could give the indorsee no better title than *Fraser* had himself. We see no authority for holding the contrary, and, therefore, there must be judgment for the plaintiff. As to the award of a repleader, it is manifest the plaintiff has taken his issue on the only material fact alleged in the first plea; and we think that a repleader ought not to be granted.

Judgment for the plaintiff.

DEFRIES v. DAVIES.

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May 7th.

TALFOURD, Serjt. had obtained a rule, calling upon the plaintiff to shew cause why the defendant should not be discharged out of the custody of the warden of the *Fleet*. The defendant, an infant sixteen years old, had been taken in execution for 100*l.*, the amount of the damages and costs in an action for slander, brought against him by the plaintiff. After being taken in execution, under a *ca. sa.* he applied to the Insolvent Court for his discharge, which the plaintiff opposed, upon the ground that the defendant, being an infant, could not execute a valid power of attorney in pursuance of sec. 49 of the Insolvent Act, 7 *Geo.* 4, c. 57, whereupon his petition was dismissed.

Where an infant, 16 years of age, was taken in execution in an action for slander, and the Insolvent Court upon petition held that they had no power to discharge him; this Court will not discharge him out of custody.

Hoggins shewed cause, and contended that the Court had no authority to interfere. He also read affidavits, which stated that special damage had been proved at the trial, and that the defendant had repeated the slanderous words since he had been taken under the *ca. sa.*

Talfourd, Serjt. submitted that it would be a case of very great hardship if the defendant was kept in confinement until he became of the age of twenty-one years, when the Insolvent Court would undoubtedly discharge him. As to the jurisdiction of the Court, there is no case precisely similar to the present, but in *Ex parte Deaken* (a), an application for the discharge of a married woman, was granted under somewhat analogous circumstances.

TINDAL, C. J.—This motion must be decided as if the Insolvent Act had never passed. The case which has been cited refers to the interference of the Court, when a husband and wife have both been taken in execution, which is quite distinguishable from the present case. It would be opening the door to many evils, if we were to say, that an infant who cannot pay in purse shall not pay in person.

The rest of the Court concurred.

Rule discharged.

(a) 5 B. & A. 759.

HUNT v. BARKLEY.

May 12th.

THE defendant had obtained a judge's order for a twelvemonth's time to plead in this cause, and on a former day *Talfourd*, Serjt. had obtained a rule for rescinding the order.

Bompas, Serjt. now shewed cause.—This order has been obtained under the following circumstances: The plaintiff had, been a mate on board a vessel engaged in the whale fishery, of which the defendant was master, and during the voyage it is alleged that the defendant had improperly left the plaintiff on a foreign shore, and proceeded on his voyage. The plaintiff having

Where the master of a ship was served with process in an action, on the eve of his departure on a foreign voyage, the Court allowed twelve months' time to plead.

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returned to *England* commenced the present action, to recover damages for the injury he had sustained, but the writ was not served upon the defendant, until a day or two before the ship was about to sail on another whaling voyage. Now, it was clearly through the laches of the plaintiff, that the writ was not sooner served, for the defendant returned to this country in *November*, 1834, and the action was not commenced until *February* following; the plaintiff being in *England* during all that period, and being engaged in prosecuting another action for his wages against the owners of the ship. The defendant has left this country in the vessel, and has left no instructions to enable a defence to be made to the action, and it is sworn that several material witnesses are now on board the ship.

Talfourd, Serjt.—It appears by the affidavits, that many ineffectual inquiries were made for the defendant, with a view to serve the writ, long before the ship sailed. It also appears that the plaintiff will require the evidence of several seafaring men, who will be gone to sea before the time for pleading expires, and the plaintiff will thus be deprived of the evidence necessary to sustain the action. The owners of the ship must have ascertained the merits of the defence to this action, in the course of the other action for wages, for a charge of desertion was then set up against the plaintiff, in answer to the claim for wages. It also appears by the affidavits, that the log-book of the ship is left in this country, which will furnish materials for the intended defence.

TINDAL, C. J.—This is a long and unusual period to allow a defendant to plead to an action, and if I could see that the plaintiff would be materially prejudiced by the delay, I should say that so long a time ought not to be allowed; but, by the affidavits, it appears that matters are so circumstanced that the trial cannot possibly take place until the ship returns to this country, for several of the crew are said to be wanted as witnesses for the defendant. A commission to examine them would be useless, as the ship is now engaged in another whaling voyage. With respect to the witnesses for the plaintiff, they may be examined before the prothonotary, under the Stat. 1 *Wm.* 4, c. 22, sec. 4. The rule will be discharged.

PARK, J.—I do not remember any case where twelve months' time to plead has been given, and if the case had come before me, I should have felt some doubt in acceding to the motion; but as the order is made, I agree, it is better under the circumstances of the case, that it should remain undisturbed.

GASELEE and BOSANQUET, Js. concurred.

Rule discharged.

FRÜHLING and an' v. SCHRÖDER.

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April 23d.

ASSUMPSIT for money had and received. *Plea*.—*Non assumpsit*. At the trial before *Tindal, C. J.*, at the sittings in *London* after *Hilary Term*, the following facts were proved. The plaintiffs were merchants in *London*, and the defendant a merchant in *Hamburg*, with an establishment in *London*, under the firm of *J. H. Schroder and Co.* Messrs. *Joppert and Co.* were merchants at *Rio de Janerio*, and were accustomed to consign goods to the defendant for sale. In the course of their correspondence, *Joppert and Co.* wrote to the defendant as follows:—

“*Rio de Janerio, 28th June, 1832.*

“Enclosed we hand you bill of lading and invoice of 80 bags coffee, shipped to your address per *Constance*. We request you will promptly realize in the best possible manner this small parcel for our account, and remit the proceeds, as also the residue of our $\frac{1}{3}$ share of the sugars per *Galathea* to Messrs. *Fruhling and Goschen, London*.

(Signed) “*Joppert and Co.*”

“*To Messrs. Schroder and Co.*”

“*Rio de Janerio, 9th July, 1832.*

“We write you to-day for the purpose of handing you bill of lading and invoice of 30 bags of coffee, per *Fortuna*, which please to receive and dispose of the same in the best possible manner for our account. The net proceeds you will settle with Messrs. *Fruhling and Goschen, London*.

(Signed) “*Joppert and Co.*”

“*To Messrs. Schroder and Co.*”

After the date of these letters, *Joppert and Co.* wrote to the plaintiffs as follows:—

“*Rio de Janerio, Aug, 29, 1832.*

“Our last was of the 20th instant; the object of this is merely to advise you that we have drawn on you

No. 382—250*l.* 9*s.* 9*d.* 60 days sight, order of *A. B.*

383—184*l.* 10*s.*

C. D.

which we recommend to your prompt attention. We request you to charge our account with these amounts, and as Messrs. *Schroder and Co.*, at *Hamburg*, will have to make you further remittances for our account against our consignments to them, we believe that our account with you will be at least balanced.

(Signed) “*Joppert and Co.*”

The plaintiffs, upon the receipt of this letter, and before they accepted the bills, wrote the following letter to the defendant:—

“*London, 6 Nov. 1832.*

“Our mutual friends, Messrs. *Joppert and Co.*, *Rio*, write to us that we

a mercantile transaction, the effect of it was properly left to the jury. *Fourthly*, that notwithstanding the money might have been payable to *Joppert and Co.* with interest, that the interest could not be recovered by the plaintiffs from the defendant.

The plaintiffs in *London*, and the defendant in *Hamburg*, were correspondents of *Joppert and Co.* of *Rio de Janeiro*. *Joppert and Co.* informed the plaintiffs that they had requested the defendant to pay the proceeds of certain coffee to them after a sale had been realized. The plaintiffs thereupon wrote to the defendant and requested to know the particulars of the remittances from *Joppert & Co.*, to which the defendant returned the following reply: “We are directed by *Joppert and Co.* to remit to you the proceeds of 110 bags real ordinary coffee, which they consigned to us, but which are not yet disposed of.” *Held*, that this amounted to an undertaking on the part of the defendant to hold the proceeds of the coffee for the use of the plaintiffs, and that the defendant could not afterwards claim to set-off the amount of the sale of the coffee against a balance due to himself from *Joppert and Co.* *Held, secondly*, that assumpsit for money had and received was the proper form of action. *Thirdly*, that the correspondence relating to

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have to expect some remittances from you for their account ; we therefore request you to let us know about how large they will be.

(Signed) "Fruhling and Co."

"To Schroder and Co."

To which letter they received the following answer:—

"Hamburg, 16 Nov. 1832.

"In reply to your favour of the 6th inst., we are directed by Messrs. Joppert and Co., of *Rio Janerio*, to remit to you the proceeds of 110 bags real ordinary coffee, which they consigned to us, but which are not yet disposed of.

(Signed) "Schroder and Co."

"To Messrs. Fruhling and Co."

Upon receiving this information, the plaintiffs accepted the bills, which were duly paid, and a correspondence upon the subject of further consignments from Joppert and Co. to the defendant, took place between the plaintiffs and the defendant, and it appeared that the defendant, after the 16th of *November*, continued to transact business with Joppert and Co. Joppert and Co. subsequently failed, and the defendant then claimed to set off the produce of the 110 bags of coffee against his account with them, and refused to pay the amount of the sale to the plaintiffs, who thereupon commenced the present action. At the trial, the learned judge told the jury that the question was, whether the defendant had assented to the appropriation of the proceeds of the coffee according to the direction given by Joppert and Co., and that if he had, the plaintiffs were entitled to recover. The effect of the correspondence he left to the jury, intimating that the letter of the 16th of *Nov.* raised a strong presumption that such an assent had been given. The jury found a verdict for 313*l.*, the amount of the proceeds of the coffee, and 39*l.* for interest on that sum from the time the coffee was realized. The learned judge reserved leave to the defendant's counsel to move for a new trial, or to reduce the damages by the amount of the interest.

Taddy, Serjt., now moved accordingly.—The letter of the 16th of *Nov.* from the defendant to the plaintiffs, was a mere notification of the order received from Joppert and Co.; but there is no express undertaking to comply with the order; the defendant does not say that he will remit the proceeds of the coffee, without claiming to deduct the balance of his own account. There is no consideration between these parties by which any undertaking can be implied; and the law of *England* is jealous of transferring a right of action from one party to another. The plaintiffs did not inform the defendant that the bills had been drawn by Joppert and Co., which had been presented to them for acceptance, although that would have been the direct and usual course of business. Had they done so, the defendant would have had an opportunity of stating that the coffee was subject to a lien for the balance of his account against Joppert and Co. If the plaintiffs had informed the defendant that the bills would not be accepted unless the defendant undertook to remit the proceeds of the coffee; and if the bills had afterwards been accepted in consequence of such an undertaking, there

would have been a good consideration upon which to found an action. The principle is laid down in *Williams v. Everett* (a); and *De Bernales v. Fuller* (b), that there must be an assent, express or implied, to constitute a privity between the plaintiff and defendant when the latter is charged for money transmitted to him by a third person. The defendant here was liable to *Joppert* and Co.; but can it be said that he is also liable to the plaintiffs? *Joppert* and Co. might have countermanded the orders they had given to the defendant, and in *Williams v. Everett* (c), Lord *Ellenborough* relies upon that circumstance. Suppose this coffee had been lost or spoiled whilst it was in the hands of the defendant before it was sold, can it be contended that the plaintiffs might maintain an action against him for money had and received?—[*Tindal*, C. J.—Then it could not be money had and received if they had not received it.]—*Secondly*, An objection arises in consequence of the learned judge having left the construction of the correspondence to the jury, whereas it was a matter entirely for the consideration of the judge. It matters not what any merchant would or would not have done upon the receipt of such a letter; but the construction of it is a pure question of law. *Thirdly*, It is submitted that the form of action has been misconceived. An action for money had and received can only be maintained upon the supposition that there has been an absolute transfer of the whole of the interest in this coffee from *Joppert* and Co. to the plaintiffs. If the defendant has been guilty of misrepresentation, or if he has kept back any facts which he ought to have communicated, he may be liable to an action on the case, and the plaintiffs would then recover such damages as they could prove. *Fourthly*, At the trial the jury allowed the plaintiffs interest upon the money received for the coffee, and upon this ground the damages ought to be reduced. The plaintiffs were not entitled to interest. In an action for money had and received interest is not recoverable; nor is the case within the provisions of Stat. 3 & 4 W. 4, c. 42, sec. 28.

TINDAL, C. J.—It appears to me, that the point submitted to the jury in effect was, whether by the correspondence between these parties, coupled with some evidence given in the cause, it did or did not amount to an assent on the part of the defendant that he would appropriate to the use of the plaintiffs the proceeds of this coffee when sold; because if the defendant did consent, that upon receiving the coffee from the remitter, the proceeds should be appropriated to pay a particular creditor, it is too late for him to retract and refuse to pay the money after the coffee is sold; and supposing that to be the case, an action for money had and received appears to be the proper form of action. Therefore the question is, whether, under the circumstances in which these parties were placed, there was a complete assent on the part of the defendant that the proceeds should be paid to the plaintiffs. The following appear to be the facts of the case:—*Joppert* and Co., who were merchants residing at *Rio*, on the 28th *June*, wrote to the defendant, who is a merchant at *Hamburgh*, enclosing to him the bills of lading for the coffee in question, and direct him to realize it as soon as may be, and remit the proceeds to the plaintiffs in *London*. Now, if the matter had rested there, it was undoubtedly optional with the defendant to have acted upon that letter

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(a) 14 East, 582.
(b) 14 East, 590.

(c) 14 East, 597.

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or not; if he had pleased he might have repudiated it, and have said that he would not accept the coffee upon those terms, and even if he had received it, and never assented to the terms, it might be said that the plaintiffs could not maintain an action against the defendant upon such an appropriation of property belonging to the original remitter, without the consent of the debtor, and that would bring the transaction very much to the case of *Williams v. Everett (d)*, where it was held that it was not sufficient to allow a person to whom a payment was to be made to become the plaintiff, where the owner had directed the defendant to pay it over, as in the present case; that it required something more, an assent, express or implied, on the part of the defendant, as there was not any privity between the parties. The next step that appeared in evidence was, that *Joppert and Co.*, on the 9th *July*, wrote a second letter to the defendant; and on the 29th of *Aug.* 1832, they also wrote to the plaintiffs, and communicated the order which they had given to the defendant; therefore at that time both the plaintiffs and the defendant were acquainted with the intention of the remitters of the coffee, and the terms upon which it was to be remitted. On the 6th *Nov.* 1832, the plaintiffs write to the defendant, and this is the first direct communication between them, wherein, after intimating the correspondence which had taken place, they request to be informed the probable amount of the remittances to be made, not at all doubting, as it appears, what the intention of the remitters was, but expecting that such intention would be complied with on the part of the defendant; still, however, it was open to the defendant to write them plainly and explicitly that he did not choose to receive the coffee upon those terms; he might have said that there was a debt owing to him by the remitters, and that, when the coffee was turned into money, he should set the proceeds to his own private account. But, instead of doing this, on the 16th *Nov.* 1832, which is in the course of the post, the defendant writes the letter of that date in answer. Now, if it is the province of the judge to put a construction upon a letter of this sort, and he is to tell the jury what is the meaning of such a letter, I am prepared to say that the construction I would put upon it is, that the party who wrote it, though he did not say so in terms, agreed to act upon the orders he had received. It has been usual, in later times, that the construction of a written instrument should not remain in the breast of the judge, particularly where it relates to mercantile concerns like the present, where it may be ambiguous in the nature of its terms, and where the intention of the parties may be elicited from other circumstances in the cause; but I put this letter to the jury rather in favour of the defendant than against him, telling them it was for them to say whether, upon the receipt of such a letter, any merchant in *London* would not suppose that he had the assent of the party to the appropriation of the proceeds of the coffee. This case differs from *Williams v. Everett (d)*, where money had been paid to the defendants, who were bankers, and when the plaintiff demanded payment, they distinctly renounced their intention to pay the money; and well did Lord *Ellenborough* say, "that before the party could maintain an action there must be some agreement, express or implied, and you could not imply it because it was against the declaration of the party." In the present case, it appears that the three parties are brought together by the letters of the

6th and 16th of *Nov.*, the remitter telling the defendant to pay the proceeds of this coffee to a particular person, to whom he owes the money, and he (the debtor) assenting to that, saying, in effect, I will become the debtor of the present plaintiff. I decide this case without going into the other parts of it, although there certainly was evidence given at the trial which tended to raise a suspicion that the set off by the defendant against his own private account, was altogether an after thought; and even if the case had stood clear of this letter, I think there was evidence for the jury, that the defendant consented that the proceeds of this coffee, when turned into money, should be the money of the plaintiffs. I therefore think the action was well brought; but with respect to the allowance of interest, a rule to shew cause may go upon that point.

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PARK, J.—The whole case turns upon the letters of the 6th and 16th of *November*. The true course for the defendant to have pursued, would have been to state that he did not intend to remit the money; and he could have given his reason for refusing to do so, saying that he had a lien upon the coffee for a balance due to himself. I was of counsel in *Williams v. Everett*, and I know that case was well considered, and the express distinction was drawn, which has been pointed out by my Lord Chief Justice. I am also of opinion, that money had and received is the proper form of action.

GASELER, J.—The defendant's letter of the 16th *November* is conclusive against him: there is nothing said about any claim which he has upon *Joppert and Co.*, nor does it contain anything of the kind.

BOSANQUET, J.—I concur with the Court in this case, in thinking, that a rule ought to be granted upon the third point, respecting interest, but not upon the other points. The defendant, in my opinion, has no ground to complain that the effect of this correspondence was left to the jury; it was a mercantile correspondence, and it has been usual, certainly, of late years, to leave to the jury the effect of such correspondence; but whether the effect of it was to be determined by the jury or the Court, I am of opinion a right construction has been put upon it, for the effect of all the correspondence is, to bring the three parties together, and an assent has been given with the privity of all three, that the proceeds of the coffee, remitted by *Joppert and Co.* to the defendant, at *Hamburg*, should be held by the defendant, on account of *Joppert and Co.*, to be paid over to the plaintiffs in *London*. If the debtor, the creditor, and a third person meet together, and it is agreed that the debt shall be transferred from the original debtor to the third person, that creates a new contract upon which the third person may be sued. That appears to be the effect of this correspondence. It amounts to an assent, on the part of the defendant, to the directions given to him in the first instance, and consequently he was bound to receive this coffee, and hold the proceeds on account of the plaintiffs. That being so, by the agreement of the whole of the parties, the coffee was appropriated to the use of the plaintiffs, and the proceeds were to be paid them when the coffee was actually sold and the proceeds were realized, and as the proceeds were held by the defendant on account of the plaintiffs, the form of action is not misconceived, and therefore an action for money had and received may be maintained.

Rule for new trial refused. Rule to reduce the damages granted.

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On a subsequent day (e), *Watson* shewed cause against the rule to reduce the damages. Interest is recoverable when, from the mode of dealing between the parties, a contract to pay it may be expressed or implied. Here it was clearly the course of dealing between *Joppert* and Co. and the defendant, to allow interest upon sums of money which remained in the hands of either party (f). In *Arnott v. Redfern* (g), the question of interest was much considered: *Best*, C. J. there says, "However a debt is contracted, if it has been wrongfully withheld by a defendant after the plaintiff has endeavoured to obtain payment of it, the jury may give interest in the shape of damages for the unjust detention of the money." From that case it appears that interest is given by the courts upon two principles:—First, where it appears from the nature of the contract that interest is to be paid. Secondly, where the debt has been wrongfully detained from the creditor. Here it is clear that the defendant was bound to remit the proceeds of the coffee to the plaintiffs as soon as he had realized them, and he not having done so, the jury might well give damages, by way of interest, for the detention of the money.

Taddy, Serjt. *contrd.*—This is an action for money had and received, and no interest can be given under that form of action. That is laid down in *Moses v. Macferlan* (h), and *Walker v. Constable* (i). In *Gordon v. Swan* (j), *Ellenborough*, C. J. said, "that the giving of interest should be confined to bills of exchange, and such like instruments, and to agreements reserving interest." The new Statute, 3 & 4 Wm. 4, c. 42, s. 28, was passed for the very purpose of giving interest in cases where it could not be recovered before; and as the plaintiff has not brought himself within the provisions of that Statute, he is not entitled to the verdict for the interest.

TINDAL, C. J.—It appears to me that this interest ought not to have been allowed. This is a mere action for money had and received, and it is laid down in *Walker v. Constable* (j), that in that form of action the plaintiff can recover nothing but the net sum received by the defendant. In *De Bernales v. Fuller* (k), which has been cited, Lord *Ellenborough* held, that in a similar action interest could not be recovered. Unless therefore, this general rule is shaken by something particular in the case before us, it must here prevail. The plaintiff relies upon the fact, that if the money had remained in the hands of *Joppert* and Co. they would have required the defendant to pay interest to them; that may be so, but the plaintiffs do not stand in the same situation as *Joppert* and Co., and therefore the transaction cannot be guided by the course of dealing between those parties. The rule for reducing the damages must be made absolute.

PARK, J.—It is properly admitted that this case is not within the Statute 3 & 4 Wm. 4, 42, s. 28. The question is, whether, by the course of dealing between the plaintiffs and the defendant, interest was payable upon this sum of money; but after looking at the correspondence, I can find nothing to warrant the supposition that it was so payable. The case, therefore, falls within the

(e) In Trinity Term.

(f) This appeared on the face of the accounts which were put in evidence at the trial.

(g) 3 Bing. 350.

(h) 2 Burr. 1005.

(i) 1 Bos. & P. 307.

(j) 12 East, 420.

(k) 2 Camp. N. P. C. 426.

principle laid down in *Walker v. Constable* (l); and *Arvott v. Redfern* (m), is by no means an authority to shew that the interest is recoverable. Lord *Ellenborough* held, in *De Bernales v. Fuller* (n), that if there was no contract expressed or implied, no interest could be allowed; and refused to save the point, requesting the Attorney-General who was Sir *V. Gibbs*, to move the Court of *King's Bench* upon the point, upon which all the judges agreed that interest ought not to have been given.

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GASKLEE, J.—This is a single transaction between the parties, and no contract to pay interest is expressed, or can be implied.

VAUGHAN, J.—I am of the same opinion. The case does not range itself within the terms of the Statute, or of the general rule which has been laid down. There is a case, *Higgins v. Sargent*, 2 Barn. & Cres. 348, where the general rule was again confirmed.

Rule absolute.

(l) 1 Bos. & P. 307.
 (m) 3 Bing. 350.

(n) 2 Camp. N. P. C. 426.

ROLAND v. HALL.

April 23d.

ASSUMPSIT for money had and received. *Plea*.—*Non assumpsit*. At the trial before *Park, J.*, at the last assizes for the county of *Berks*, it appeared that the plaintiff and the defendant were both attorneys, and that the defendant had for many years acted as clerk to the magistrates of one of the divisions of the county of *Berks*. In 1833, two of the magistrates who were accustomed to attend at the petty sessions for the division, appointed the plaintiff to be their clerk; but a third magistrate, who also attended those sessions, requested the defendant to continue to act as his clerk. In consequence of this circumstance, disputes having arisen between the parties, it was agreed between them that they should leave the matters in difference to the determination of two persons, who thereupon directed that the defendant should continue to act as clerk, but that he should divide the fees which he received equally between himself and the plaintiff. The defendant afterwards continued to act as clerk, and to receive the fees of the office as he had been accustomed to do, but refused to pay over a moiety of his receipts to the plaintiff, who then brought this action to recover the same. The jury found a verdict for the plaintiff for 10*l*.

Where the plaintiff and defendant, both claiming to act as clerks to the justices of a division, agreed to leave the dispute to the determination of third parties, who directed that the defendant should act in the office, and divide his fees with the plaintiff. *Held*, that an action for money had and received might be maintained to recover the moiety of the fees received, and that the defendant could not allege that he was legally entitled to all the fees.

Talfourd, Serjt., by leave reserved, now moved to set aside the verdict, and to enter a nonsuit.—The defendant was clerk to the magistrates of the whole division, and therefore he was never legally removed from his office, and was entitled to retain the whole of the fees (a).—[*Park, J.*—Did he not

(a) There is very little information in the Law Books upon the nature of the office of a clerk to the justices; the office is recognized in 26 Geo. 2, c. 14; 6 Geo. 4, c. 50, s. 10; and 9 Geo. 4, c. 61, s. 15. In *Ex parte Sandys*, 4 Barn. & Ad. 863, it was held that a clerk to justices "has no legal

hold upon his office; he is only appointed to assist the justices; it is an office during pleasure, like that of a vestry clerk." The nature of offices in general is discussed in *Owen v. Saunders*, 1 Lord Ray. 104, 5th ed.

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agree to leave the disputes to the determination of third parties?—If that were so, the agreement was without consideration. Another objection is, that money had and received was not the proper form of action. The agreement ought to have been specially pleaded.

TINDAL, C. J.—I think we ought not to interfere in this case. The action was not brought to try the right to the office, but it was founded upon the particular and specific agreement entered into between the parties. It was proved that the defendant agreed to do whatever *A.* and *B.* should say he ought to do: they were consulted, and they held that he ought to divide the fees with the plaintiff. Nor can this agreement be said to be entirely without consideration.

The rest of the Court concurred.

Rule refused.

April 24th.

WHITE v. PARKER.

1. A testator devised his freehold estates to trustees upon trust, as to three undivided fourth parts, "to pay to or permit and suffer" his wife and daughters to receive "the clear yearly rents and profits," and as to the other undivided fourth part, "to pay to or permit and suffer" his son to receive "the clear yearly rents and profits." He further directed that the shares of his wife and daughters should be for their sole and separate use; and that the trustees should let the estates upon certain conditions, and out of the rents should pay all taxes, and for repairs.—*Held,*

COVENANT by the assignee of lessee, against assignee of the reversion.

The declaration stated, that by indenture dated the 8th October, 1807, between one *George Adams* and one *Alexander Fairweather*, the said *G. Adams* did demise unto the said *A. Fairweather*, a certain close, &c., to hold unto the said *A. Fairweather*, his executors, administrators, and assigns, for the term of twenty-five years, at a certain rent, payable to the said *G. Adams*, his heirs and assigns, as therein mentioned. And the said *G. Adams* did, for himself, his heirs and assigns, covenant with the said *A. Fairweather*, his executors, administrators, and assigns, that the said *G. Adams*, his heirs or assigns, would, at the end of the said term, pay unto the said *A. Fairweather*, his executors, administrators, and assigns, at a fair valuation, for all such erections as should be erected on the said premises during the said term, such valuation to be made by two appraisers; and also would pay for all such trees and bushes as he the said *A. Fairweather*, his executors, administrators, and assigns, should plant on the said premises, and as should be standing and growing thereon at the end of the said term, at such fair valuation to be made as was directed concerning the erections. [The declaration then stated the entry of *Fairweather*, and divers mesne assignments, and an assignment from the last assignee to the plaintiff.] That after the making of the said indenture of demise, and during the said term, to wit, &c., the next and immediate reversion, estate, right, title, and interest of him the said *G. Adams*, expectant on the determination of the said demise, by assignment thereof legally came to and vested in the said defendant; whereupon the said defendant then became seised of the said reversion, to wit, in his demesne as of fee, and continued so seised until and at the expiration of the

that the legal estate in the whole of the premises vested in the trustees.

2. The above devise was to two trustees, "their heirs and assigns," and the testator directed that upon the death, incapacity, or refusal to act of any trustee or trustees, a new trustee or trustees should be appointed. One of the trustees died, and the survivor, by a deed of lease and release and appointment, to which all the *cestui que trusts* were parties, renounced the trust and conveyed the premises to one new trustee, who acted in the execution of the trusts.—*Held,* that notwithstanding the intention of the testator that two trustees should always be in existence, and notwithstanding the power of appointing new trustees was not strictly pursued, the legal estate in the premises vested in the trustee so appointed, and that he was therefore liable to be sued in covenant as assignee of the reversion of certain premises belonging to the testator.

said term, to wit, &c., and at the expiration of the said demise the said defendant entered into said demised premises, and became possessed thereof. [The declaration here set forth, that divers buildings, trees, and bushes were upon the premises at the expiration of the term, which were duly appraised and valued at 1,721*l.* 9*s.* 6*d.*, which sum the defendant had refused to pay, which was the breach complained of.]

Pleas.—That the next and immediate reversion, estate, right, title, and interest of the said *G. Adams*, of, in, and to the said premises, did not by assignment thereof legally come to or vest in the defendant, in manner and form, &c. There were also three other special pleas, upon which no question arose. Issues were taken and joined upon the four pleas.

The cause was tried at the *Middlesex* sittings in 1835, before *Tindal, C. J.*, when the following facts were in evidence:—

The said *G. Adams*, by his will, dated 19th *July*, 1809, after directing the payment of his debts out of his personal estate, and giving certain household goods between his wife *Catharine* and his daughter *Mary*, gave and devised all that freehold piece or parcel of land called *Ox Close*, with the barn and shed thereon [this was the land and premises demised by the said lease of 8th *Oct.* 1807], situate, &c., and all that his undivided moiety of all those two freehold messuages, situate, &c. [this was other property belonging to the testator], and all his other real estate whatsoever, and all his estate and interest therein, with their appurtenances, unto *Joseph Ringham* and *Thomas Suter*, their heirs and assigns, upon trust; as to one-fourth part of all his said devised real estate, to pay to, or permit and suffer his said wife *C. Adams* to have and receive the clear yearly rents and profits thereof for her natural life; and after her decease, in trust to permit his son *George*, and his daughters *Elizabeth* (the wife of *William Wright*) and *Mary Adams*, to receive the clear rents thereof, remainder to the heir or heirs of the survivor of his said three children in fee. And as to one other fourth part of all his said devised real estates, upon trust to pay to, or permit and suffer his said son *George Adams* to have and receive the clear yearly rents, issues, and profits thereof, for and during the term of his natural life; and after his decease, in trust for the eldest or only son (as the case might be) of his said son *George*, who should be living at his decease, his heirs and assigns; and if his said testator's son *George* should not leave a son surviving him, then in trust for such person as at the decease of his said son *George* should be his heir, and his heirs and assigns. And as to one other fourth part of his said real estate, upon trust to pay to, or permit and suffer his said daughter *Elizabeth Wright* to have and receive the clear yearly rents and profits thereof for her life; remainder to her children in fee, with remainders over. And as to the remaining fourth part of his said real estate, upon trust to pay to, or permit and suffer his said daughter *Mary* to have and receive the clear yearly rents and profits thereof for her life; remainder to her children in fee, with remainders over. And the said testator did declare it to be his will and meaning that the several parts and shares of his said wife and daughters in the rents and profits of his thereinbefore devised real estate should be for their respective sole and separate use while under coverture, and should be paid into their own hands, or to such person as they should by writing under their hands direct or appoint, and that their receipts alone should be sufficient; and that such rents should in nowise be subject to the control or debts of their respective husbands. And he further

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directed his trustees, and the survivor of them, and the heirs and assigns of such survivor, from time to time, in their own judgment and discretion to let and set his said devised real estates for such term or terms of years not exceeding seven years, and on such conditions as they should think fit, always reserving the best and most approved yearly rent or rents which, under all circumstances, could be reasonably had or gotten for the same. And further, during the continuance of the trust thereinbefore declared of and concerning his said devised real estates, out of the rents, issues, and profits thereof, to pay and discharge all outgoings for taxes or otherwise, in respect to the premises, and to keep the premises in repair, and to retain payment for their expenses. And he also directed, that, upon the decease of his said trustees, or either of them, or of any other trustee to be appointed, or upon his or their refusing or becoming incapable to act in the trust, a new trustee or trustees should be appointed in his or their place by the surviving or continuing trustee, or the executors or administrators of the surviving trustee; and thereupon the trust estate should be conveyed to and vested in the surviving or continuing and the new appointed trustee or trustees jointly, and in case there should be no surviving or continuing trustee or trustees, then in such newly appointed trustee or trustees and their heirs, upon the several trusts thereinbefore declared concerning the same, or such of them as should be then subsisting or capable of taking effect; and that every such new trustee should act therein as if he had been appointed by him the testator.

Ringham died in 1818, and afterwards, by an indenture, dated the 17th November, in that year, to which *Suter* and all the *cestui que trusts* were parties, after reciting that *Suter* had refused to act further in the trusts of the will, and that with the privity and approbation of the *cestui que trusts* he had agreed to appoint the defendant to be a new trustee in the place and stead of *Joseph Ringham*, deceased, it was witnessed, that for the purpose of vesting the freehold messuages, lands, and hereditaments devised by the said will, in the defendant, his heirs and assigns, upon the trusts therein contained concerning the same, the said *Suter*, by and with the privity and approbation of the said *cestui que trusts*, did bargain, sell, and release the said premises to the said defendant accordingly; and the defendant was also appointed sole trustee;—proof of his acting as trustee was also given, and that the estate had never been divided.

When the action was commenced, all the *cestui que trusts*, named in the will, were living, and it appeared that *George Adams*, the son, was of full age at the date of the will.

A verdict was taken for the plaintiff, for the damages stated in the declaration, subject to the opinion of the Court upon two points, which were made by the counsel for the defendant.

First, That the use was executed, under the Statute of Uses, in *George Adams*, the son, as to his fourth part of the estate, and that therefore he took the legal estate therein under his father's will, *Doe d. Leicester v. Biggs* (a).

Secondly, that the defendant was not legally appointed a trustee in pursuance of the power contained in the will of *George Adams*.

Taddy, Serjt., having obtained a rule *nisi* to set the verdict aside upon these grounds,

Smirke shewed cause.—As to the first point, regarding the appointment of the defendant as trustee, it may be admitted that the power in the will contemplates that there should always be two trustees in existence; but the legal estate passed so as to make the defendant liable, notwithstanding the power of appointment was not strictly pursued. By the operation of the deed of lease and release, and appointment, the legal estate in the premises passed, and at all events the defendant and *George Adams* being parties to the conveyance, they are both estopped from saying that no interest passed. In *Doe d. Read v. Godwin* (b), where a conveyance under a Statute was required to be made by five trustees, it was held, that a conveyance made by four surviving trustees only, was valid, although the Statute contained a clause which required the trustees to fill up a vacancy occasioned by death. And this decision being upon the construction of a direction given by an act of parliament, applies with still greater force to a private conveyance. Secondly, it must be admitted on the other side, that as to three-fourths of the testator's estates, the legal estate is vested in the trustees, in order to secure the property to the use of the wife and daughters, *Harton v. Harton* (c), *Jones v. Lord Say and Seale* (d). The words used in this will are similar in each of the four devises, "to pay to, or permit and suffer," and there is nothing to shew that it was the intention of the testator to make any distinction between the devise to the son, and the other devises. On the contrary, he has made it absolutely necessary that the trustees should have the legal estate in the whole premises, for they have a power to let the estates upon certain conditions. They are also required to pay and discharge all outgoings for taxes, or otherwise, in respect of the premises, and to keep them in repair. This they could not do unless they had the control of the whole estate. *Doe d. Leicester v. Biggs* (e) will be cited on the other side, but in that case, the other parts of the will did not enable the Court to collect the intention of the party, and for want of a better reason they held, that the last words used in the will should prevail; there the trustees had no active duties to let or repair imposed upon them, nor was there any devise with a view of preserving the property for the sole and separate use of the party beneficially interested.—*Smirke* was here stopped by the Court.

Taddy, Serjt., and *Brle*, in support of the rule.—No inconvenience would arise if the son, *George Adams*, were held to be tenant in common with the trustees, in whom the legal estate in the three other fourth shares of the estates is vested. It was necessary that the powers to let and repair should be given to the trustees, for the purpose of the trusts declared in favour of the females, but there is no intention manifested by the testator to tie up the son's estate, and the principle of the law is rather to set estates free. If the words of the devise to the son are alone considered, *Doe d. Leicester v. Biggs* (e) is an express authority, to shew that the legal estate was executed in the son. The words of the devise, in that case and the present, are precisely the same, "to pay to, or permit and suffer;" and Lord *Mansfield* there lays down the general rule of law, "that the first words in a deed, and the last words in a will shall prevail." *Jones v. Lord Say and*

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(b) 1 Dow. & Ry. 259.

(c) 7 T. R. 652.

(d) 8 Vin. 262, pl. 19, MS.; S. C. 1 Eq. Ca. Abr. 383.

(e) 2 Taunt. 109.

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Seale (f), and *Harton v. Harton (g)*, were both cases where the Court held the trust to be executed in the trustees, for the very purpose of preserving the interests of married women. *Secondly*, The testator clearly manifests an intention in his will, that there should be always two trustees. He devises the estates to *Ringham* and *Suter*, "their heirs and assigns," and then he makes a provision, that upon the decease or incapacity, or refusal to act, of his trustees, or either of them, that a new trustee or trustees should be appointed. Upon the death of *Ringham*, *Suter* ought to have appointed another trustee, and both should then have joined in a conveyance to new trustees. The conveyance by *Suter* operates under the Statute of Uses, and the intention of the testator must therefore be considered, and this Court has power to carry his intention into effect. *Doe d. Read v. Godwin (h)* does not apply, for that was not a conveyance which operated under the Statute of Uses.

TINDAL, C. J.—This case comes before us upon the question, whether the immediate reversion in the premises did or did not vest in the defendant. Two points have been made against the plaintiff's right to recover. *First*, that the interest devised by *Adams's* will was executed, as to one-fourth part, in one of the *cestui que trusts*. *Secondly*, that no legal estate has passed to the defendant, because the power to convey to new trustees, as declared in the will, has not been well pursued. I agree that the only party who can be charged, is the party in whom the legal estate in the reversion is vested. The first point depends upon what was the intention of the testator, as it appears in his will, and I think we cannot give full effect to his intention without saying that the use is executed in his trustees, as to the whole of the real estate. Indeed the counsel for the defendant limit their argument to the one undivided part devised to *George Adams*. In the first place there is a general devise of all the testator's real estate to the two trustees who are originally appointed, their heirs and assigns; and then there are separate uses declared, of the undivided fourth parts. That on which the argument arises is as follows:—[The learned judge here read the devise in favour of *George Adams*, as already stated, *ante*, 113.]—Now it is said, that as the words used are, that the trustees shall "pay to, or permit and suffer" the son to receive the clear yearly rents, that this case is affected by *Doe d. Leicester v. Biggs (i)* where the same option being given to the trustees, the Court said that the last words used must prevail. But the Court there say that these latter words must prevail, for want of a better reason, and therefore it was a very technical construction which was given to that will. But that case, in its very terms does not agree with the present. In *Doe d. Leicester v. Biggs*, the devise is to receive "the rents, issues, and profits," here it is to receive "the clear yearly rents, issues, and profits," and then immediately follows a direction that the trustees shall repair and pay all taxes and outgoings. Besides, it appears, that as to three fourth parts of the premises, it is absolutely necessary that the use should be executed in the trustees, for the case of *Jones v. Lord Say and Seale (f)*, shews it to be so, for the protection of the female *cestui que trusts*, and it would be

(f) 9 Vin. 262, pl 19, MS.; S. C. 1 Eq.
 Ca. Abr. 383.
 (g) 7 T. R. 652.

(h) 1 Dowl. & Ry. 259.
 (i) 2 Taunt. 109.

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a very anomalous construction to say, that as to one-fourth part of the premises *George Adams* is legally possessed, and as to the remaining three parts, that the legal estate is vested in the trustees. How can we reconcile this to the general power given to the trustees to demise the estates at the best rent which can be had? If *George Adams* was in possession of one-fourth part, how could the trustees receive the rent of the whole of the real estate? The testator also goes on and directs the trustees, out of the rents of the premises, to pay all outgoings for taxes, and keeping the premises in repair. Again, how could the trustees satisfactorily execute this part of the testator's directions, if they permitted the son to enjoy one fourth part, and then paid the outgoings out of the rents of the remaining three fourth parts? If they did so they would be allowing the son a larger share of the estate than the testator intended. It seems to me, therefore, it would be impossible to carry the intention of the testator into effect without holding that the use, as to all the premises, was executed by the Statute in the trustees. Mr. Serjt. *Williams*, in his notes to *Saund. Rep. (j)*, lays down the rule upon this subject as follows: "So, where something is to be done by the trustees which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate;" and *Shapland v. Smith (k)*, which is cited in the same note, is to the same effect. The proper construction of this will, therefore, seems to me to be that the trustees took the legal interest in the whole premises. *Secondly*, it is contended that the defendant has not been legally appointed a trustee. Undoubtedly it may be contended that the testator meant that when one trustee died or disclaimed, that another should be appointed in his stead, so that there should be always two in existence. But *Suter* conveys all his interest in the premises to *Parker*, the defendant; and how can we, seeing the operation of the deed is to convey the legal estate, say that the defendant is not now trustee? It seems to me to be doubtful how far a Court of Equity would interfere, for *Suter*, who is a party, could not say *nihil operatur*, nor could the *cestui que trusts* complain, for they are also parties to the conveyance. But what the Court of *Chancery* would do, it is not necessary to consider, it is sufficient for us to say that the plaintiff is entitled to recover in the present action.

PARK, J.—After the learned judgment which has been delivered I need not enter at length into the consideration of these questions. It is said that if we decide this case in favour of the plaintiff we shall overrule *Doe d. Leicester v. Biggs (l)*. But Lord *Mansfield* there draws the very distinction which has been pointed out by my Lord between that case and the present: he says, "I thought that it had been settled that the distinction was abolished by the case of *Shapland v. Smith*, unless in cases where something especial was to be done by the trustee, as to pay rates or repairs." There were no such duties to be performed in *Doe d. Leicester v. Biggs*, and *Kerrick v. Beauclerk*, 3 Bos. & Pul. 175, proceeded upon the same principle. Lord *Alvanley*, who delivered the judgment of the Court in the last case,

(j) Vol. 2, p. 11, b.

(k) 1 Bro. C. C. 75.

(l) 1 Dow. & Ry. 259.

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was well versed in real property law, and he cited with approbation the passage which has been read by my Lord from Serjt. *Williams's* notes. The directions in the will relating to repairs and taxes, refer to the whole of the estate, which was previously devised, and I see no reason for making any distinction between the son's share and the other portions of the estate. I am therefore of opinion, that the legal estate passed to the trustees. As to the second ground of objection, it has already been fully and satisfactorily answered.

GASELEE, J.—There are two points in which this case differs from *Doe d. Leicester v. Biggs* (m). First, The testator refers to *clear* yearly rents, which can only mean after some payments have been deducted out of them. Secondly, The devise to *George Adams* is followed by the directions to let and repair the premises, whilst in *Doe d. Leicester v. Biggs* the devise was not followed by any such directions. If we were to hold that one-fourth share vested in the son, in what a situation would the trustees be placed? Differences about repairs and other matters would arise between them and the son, and squabbles would continually occur. As to the second point, I see no difficulty in deciding that the defendant is liable. He has taken a conveyance of the property in the usual form from *Suter*, who was appointed trustee under the will. Whether a court of equity would give any relief we are not called upon to determine.

BOSANQUET, J.—The only question is, whether the legal estate in the whole of the premises vested in the trustees under *Adams's* will, or whether as to one-fourth part it vested in the testator's son. The terms of the devise to the son certainly bear a considerable resemblance to the devise in *Doe d. Leicester v. Biggs* (a); but my lord has already pointed out the material difference occasioned by the use of the word *clear*, and by the subsequent directions relating to letting and repairing the premises, and paying the taxes. In order to effectuate the intentions of the testator, it seems to me to be necessary that the trustees should have the legal estate in the whole premises.

Rule discharged.

(m) 1 Dow. & Ry. 259.

May 12th.

BRADLEY and o^r v. MILNES.

Where the defendant was arrested for 65l. and the plaintiff recovered only 44l. Held, that under the circumstances proved at the trial, the defendant was entitled to have his costs taxed under 43 Geo. 3, c. 46, s. 3.

ATCHERLEY, Serjt., had obtained a rule to shew cause why the defendant in this action should not be allowed his costs, to be taxed under Stat. 43 Geo. 3, c. 46, s. 3. The plaintiff had held the defendant to bail for 65l. 16s. 6d.; and at the trial before *Park, J.*, the jury found a verdict for 44l. 4s. 10d. The plaintiffs, who were ironfounders, had been employed by the defendant to execute some iron-work upon eight dwelling-houses which he was building. At the trial, the defence set up was, that one *Ponsford*, and not the defendant was liable to pay for the iron-work supplied for two of the houses, and that the plaintiffs had entered into a contract to supply the material at a certain price. The verdict given by the jury included the price of the iron-work supplied for the eight houses at the contract price.

Telfourd, Serjt., and S. B. Harrison, shewed cause.—The affidavits disclose that the plaintiffs considered that the contract had been broken, and that they were therefore entitled to sue for the price of the iron-work by measure and value, and evidence to prove this was given at the trial, but the jury allowed the plaintiffs nothing more than the contract price for the whole work. It is expressly sworn that the plaintiffs entered into no contract for performing the work at the two houses which were said to belong to *Ponsford*. Here there was clearly reasonable and probable cause for holding the defendant to bail for the whole demand.

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Atcherley, Serjt., and R. V. Richards, contra.—The cases decided upon this Statute are stricter than they were formerly. It is not necessary that the arrest should be malicious, *Donald v. Brett (a)*. In *Gomperts v. Denton (b)*, the cases are all reviewed, and it is established that the plaintiff is bound to make the case clear or the defendant will be allowed his costs according to the Statute.

TINDAL, C. J.—The question for the opinion of the Court is, whether it appears that the plaintiffs had reasonable and probable cause for arresting the defendant for 65*l.* 16*s.* 6*d.* The amount awarded to the plaintiff by the jury was 44*l.* 4*s.* 10*d.*; and one of the questions which arose at the trial was, whether a contract had been entered into for the performance of the work. On the part of the defendant, it is expressly sworn that there was such a contract, and that has been confirmed by the verdict of the jury; but even supposing that the work performed at two of the houses, is not calculated at the contract price, but according to the measure and value calculation, it appears that even then the plaintiffs would not have been entitled to arrest for so large a sum. It would appear, therefore, that the plaintiffs were influenced by some imaginary grievance in consequence of the refusal of the defendant to pay for the work at *Ponsford's* houses, and we cannot but say that they were ill advised in supposing that they were entitled to arrest for so large a sum. The rule must be made absolute.

The other judges concurred.

Rule absolute.

(a) 1 Cro. & Mee. 207.

(b) 10 B. & C. 117.

HESKETT v. BIDDLE.

REPLEVIN.—*C. Jones* moved for a rule to shew cause why the defendant in replevin should not give security for costs. The plaintiff had become tenant to the mortgagee in possession of premises mortgaged by the defendant. The plaintiff had always paid rent to the mortgagee. The affidavit stated that the defendant was in indigent circumstances, and had taken the benefit of the Insolvent Act, but upon being discharged, had issued the distress for rent upon the plaintiff's goods, which had therefore been replevied.

A plaintiff in replevin is not entitled to security for costs, although the defendant is in insolvent circumstances.

Per Curiam.—In point of fact, it is the plaintiff who is defending the action. His goods are taken for the rent, and he chooses to contest the defendant's right to seize them. Under these circumstances, he is not entitled to ask for security for costs.

Rule refused.

Com. Pleas.

April 25th.

DUKES v. GOSTLING.

1 In a declaration in trespass on the case, the plaintiff stated, by way of inducement, that the defendant, before the committing of the grievance thereafter mentioned, was possessed of a close used as a private road, and then the injury was stated to have been sustained by the defendant, digging a sewer in the said close used as a private road, and thereby withdrawing the water from a pond on the plaintiff's close.

It was in evidence that at the time of digging the sewer the defendant's close was not used as a private road:—*Held*, that under the plea of not guilty, the defendant admitted all matters of inducement:—and *semble*, that the allegation of the user of defendant's close was surplusage.

2 The wrongful act complained of was the digging and continuing the sewer, and thereby diverting the water from the pond. The evidence was, that the water was not diverted by digging the sewer, but previously, for the purpose of making the sewer, and it appeared that since the sewer had been made, the water in the pond could not rise to its former height:—*Held*, that there was no variance between the declaration and the proof, so far as it related to the continuing of the sewer.

CASE. It was stated in the *declaration* that long before the committing of the grievance thereafter mentioned, the defendant demised unto the plaintiff, for a term which was not yet expired, a certain close of land, and a pond full of water in and upon the said close, situate in the parish of *Islington, &c.*, and whereas before and at the time of committing the grievance by the said defendant thereafter mentioned, and from thence hitherto, the plaintiff had been and still was, under and by virtue of the said demise, lawfully possessed of the said close of land with the appurtenances, and of the said pond full of water, situate in and upon the said close. *And whereas also the said defendant before and at the time of the committing of the grievance thereafter mentioned, was possessed of a certain close of land used and employed by the said defendant as a private road, and adjoining the said close of land of the plaintiff, and the said pond full of water in the said close*; nevertheless, the defendant, contriving and intending to injure, prejudice and aggrieve the said plaintiff, and to deprive him of the use and benefit of the said pond full of water, whilst the said plaintiff was so possessed of the said pond of water, to wit, on the 1st day of *May, 1833*, and on divers other days and times between that time and the time of the commencement of the suit of the plaintiff against the defendant in that behalf, wrongfully and injuriously cut, dug, and made in *his said close, used as a private road as aforesaid*, a certain large sewer, close to and adjoining the said close and the said pond of water of the plaintiff; and kept and continued, and caused to be kept and continued, the said sewer adjoining to the said close and pond of water of the plaintiff, for a long space of time, to wit, from thence hitherto, and thereby, during all the time aforesaid, wrongfully drew off and diverted large quantities of the water of the said pond; and the said plaintiff thereby, for want of sufficient water in the said pond, could not during that time, use, occupy, and enjoy his said close and his said pond full of water as he otherwise might, could, and would, and ought to have done. To the plaintiff's damage of 1000*l.*: *Plea*. Not guilty.

At the trial before *Park, J.*, at the *Middlesex* Sittings, in *Michaelmas Term*, it appeared that the plaintiff was tenant to the defendant, of the close and pond of water stated in the declaration, at the rent of 40*l. per annum*, and that the defendant being desirous of making a road through the close, and over a part of the pond, agreed with the plaintiff to reduce his rent to 30*l. per annum*, in consideration of his being allowed to make and use the road; and he also agreed to leave a sufficient supply of water in the pond for the use of the plaintiff's cattle.

For the purpose of draining the road it was necessary to make a sewer through the pond, and the defendant accordingly caused the pond to be emptied, and the sewer was then built and the road made, but the road was not made until the sewer was completed; the plaintiff proved that after the formation of the sewer, the pond leaked, and consequently remained empty; and it further appeared, that if the pond had not leaked, the sewer was so

constructed as to act as a drain from the pond after the water rose to the height of two feet and a half. Upon this state of facts the counsel for the defendant objected that the defendant's close was improperly described in the declaration, and that the injurious act which was proved, did not correspond with the statement of the injury contained in the declaration. The learned judge refused to nonsuit, on these grounds, but reserved leave to make a future application. A verdict was found for the plaintiff for 30*l.* damages

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Spankie, Serjt. having, on a former day, obtained a rule *nisi* to enter a nonsuit,

Byles shewed cause.—*First*, There is no variance in the description of the defendant's close; the words in the declaration are, "that the defendant made, in the said close used as a private road as aforesaid, a certain large sewer." That does not mean used as a private road at the time of the injury being committed, but so used at the time of the commencement of the action. Suppose this had been an ejectment for the recovery of the close. It is clear that the description would be held to apply to the time of action brought. *Vin. Abr.* tit. "Declaration" (P). "For land cannot be demanded now, but by the name as it is now."—[*Tindal, J.*—Because otherwise the sheriff would not know what land to put the plaintiff in possession of.]—*Poynt's case* (a), was an indictment for a forcible entry, and it was laid, that such a day and year the defendant entered into land *existens liberum tenementum* of *J. B.*, and judgment was reversed for not saying *ad tunc existens*, for it might be the freehold of *J. B.* at the time of the indictment, but not at the time of the entry; and that was confirmed in *Bridges' case* (b).—[*Tindal, C. J.*—At that time the proceedings were in Latin.]—*Rex v. Somerton* (c), and *Rex v. Ward* (d), are also in point. *Secondly*, admitting that there is a variance in consequence of a misdescription of the premises, the plaintiff is still entitled to retain his verdict for the continuation of the nuisance, for a subsequent part of the declaration states that the defendant kept and continued the said sewer adjoining to the said close and pond of water, and thereby for a long space of time drew off, and diverted the water of the said pond; and evidence was given at the trial, which was applicable to this statement of damage.

The *third* answer to the objections, arises on the new rules of pleading. The defendant has pleaded *Not guilty*, and by that plea he has admitted all the facts stated in the inducement, which includes the description of the defendant's close, as being used and employed as a private road. The rule *Hill. T. 4, W. 4, tit. IV.* in Case 1, is that "In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea." *Fourthly*. The defendant's close is described as adjoining to the plaintiff's close and pond of water, and that of itself would be a sufficient description. The statement of the use of the close was altogether an unnecessary statement, and therefore the variance is not substantial, and at all events might be amended under 3 & 4 *W. 4, c. 42, s. 23.* In *Hill v.*

(a) Cro. Jac. 214.

(b) Cro. Jac. 639.

(c) 7 Barn. & Cress. 463.

(d) 2 Lord Ray. 1461.

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Salt (e), where in debt on bond there was a variance in the declaration in the statement of the penalty of the bond, the Court held that not to be a substantial variance, and that it might therefore be amended under that Statute.

Spankie, Serjt., and Knowles, contra.—The plaintiff charges the defendant with cutting a sewer in his close, used as a private road, and thereby depriving him of the water in the pond. That is the particular grievance complained of, for the soil belonged to the defendant. The plaintiff was bound to prove this description of the cause of action in the terms of his allegation. As to the answer that the user refers to the time of commencing the action, it cannot be maintained, and *Rez v. Somerton* (f), is against that view of the case; and the cases in *Cro. James*, are not like the present, for here the declaration expressly states that “at the time of the grievance” the close was used as a private road. Then, the act of the defendant is said to be a continuing nuisance; that might be the subject of another suit, but a plaintiff cannot bring an action *quia timet*. *Secondly*, there is a further misdescription of the cause of action. The defendant is charged with cutting a sewer in the road, whereby the water was withdrawn from the pond. The evidence was, that the water was withdrawn before the sewer was made, and for the very purpose of making the sewer.

TINDAL, C. J.—In this case the defendant relies on two objections. *First*, on a misdescription of the grievance of which the plaintiff complains: *secondly*, upon a variance in another point, *viz.* that the pond was not emptied by the sewer, but by the steps taken preparatory to making the sewer. Looking at the evidence given at the trial, I think that the present application has been answered. The declaration states that the defendant, “whilst the plaintiff was possessed of the pond, wrongfully cut in his said close, used as a private road as aforesaid, a certain sewer, and thereby wrongfully drew off and diverted large quantities of the water of the said pond.” But in a former part of the declaration, the plaintiff has stated, by way of inducement, that the defendant before, and at the time of the committing of the grievance, was possessed of a certain close of land, used and employed by the said defendant as a private road. And this gives rise to the first objection which is made, namely, that when the sewer was cut, the defendant’s close was not used as a private road. The words “used and employed” are certainly equivocal, and are capable of importing a user of that kind either at the time of the trespass, or when the action was brought. At all events this ambiguity might be cleared up by evidence which would shew the time when the close was used as a road. But does this matter of description relate to the *gravamen* of the present action? What has it to do with the wrongful act of the defendant, or with the amount of damages which the plaintiff has sustained? It is quite immaterial whether the close was used as a field or a garden. But it is not necessary to decide the case upon this point, for by the new rules, as the defendant has only pleaded not guilty, he denies only the commission of the injury, and not the matters of inducement.

(e) 2 Cr. & Mee. 420.

(f) 7 B. & C. 463.

Then comes the second objection, that the plaintiff charges the defendant with having dug and continued a sewer, whereby the water was withdrawn from the pond : whereas the evidence was, that the pond was emptied for the purpose of making a sewer, and that when the sewer was dug, the pond was already empty. But the action is brought not only for digging the sewer, but also for keeping and continuing it, and thereby drawing off and diverting the water from the pond ; and it appears by the evidence, that after the sewer was made, the water in the pond was never as deep as before, because the sewer acted as a drain to the pond, when the water attained a certain height. Upon these grounds I think that the verdict may be sustained.

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GASELEE, J.—If I were called upon to give an immediate opinion, I should say that the description of the defendant's close applies to the time when the injury was committed, but it is not necessary to decide that question, for I think that under the new rule, the defendant is precluded from objecting to that which is mere matter of inducement.

PARK, J., concurred.

Rule discharged.

BOSANQUET, J. was sitting elsewhere, as Lord Commissioner of the Great Seal.

PASSENGER v. BROOKES.

April 24th.

ASSUMPSIT on a special contract contained in an agreement between the plaintiff and defendant, as to the building of two houses. *Plea* :—that the defendant did not promise in manner and form alleged.

In assumpsit, under a plea of non-assumpsit, the consideration for the promise is not traversed.

On the part of the defendant evidence was tendered *dehors* the agreement, to shew that there was no consideration to support it ; but *Tindal*, C. J., before whom the cause was tried, rejected the evidence, upon the ground that it could not be given under a plea of *non assumpsit*. Verdict for plaintiff.

Talfourd, Serjt. moved for a new trial.—He contended that the evidence ought to have been received. The consideration is a part of the promise alleged in the declaration, and if the consideration fails, there is no foundation for the promise. This view of the case is supported in the example given in *R. Hil. T. 4 W. 4, Assumpsit*, 1. " In an action on a warranty, the plea of *non assumpsit* will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach."

Per Curiam.—The third example is more in point with the present case. " All matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud, or otherwise, shall be specially pleaded."

Rule refused, but upon another ground a rule for a new trial was granted.

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SMITH and an', Assignees of WHALLEY, a Bankrupt, v.
CRAMER.

A trader in embarrassed circumstances wrote letters in *January* to the holders of bills due the following month, praying for further accommodation. To prove an act of bankruptcy, several weeks after writing the letters, evidence was given that the bankrupt left his home under circumstances of suspicion:—*Held*, that for the purpose of shewing the motives for his absence, the letters were admissible.

THIS cause was tried before *Park, J.*, at the last assizes for *Stafford*. Verdict for the plaintiff. At the trial the question was whether *Whalley* had committed an act of bankruptcy on or before the 5th of *March*, 1835, and it was in evidence that in *December*, 1834, and *January*, 1835, he was in embarrassed circumstances, and on the 25th of *February*, an execution then being in his house, he had borrowed one pound of a neighbour, and left his home and business at *Stafford*, and remained at *Liverpool* for three weeks, when he returned home for a very short period, after which he again left, and was not seen again until after the supposed act of bankruptcy. In order to shew the motives of his absence from home, two letters, written by the bankrupt on the 16th of *January*, were read in evidence. They were addressed to the holders of certain bills of exchange, due in the following month, upon which the bankrupt was liable, and in the letters the bankrupt prayed for further time to pay the bills, in consequence of his inability to meet them when due.

Ludlow, Serjt. now moved for a new trial, and amongst other points he objected that these letters ought not to have been received in evidence. They are inadmissible, for they do not accompany or relate to the act of bankruptcy, which was relied on. In *Less v. Martin (a)*, Mr. *J. Park* rejected the declaration of a trader made in the evening, which referred to his absence from home on the morning of the same day, saying, "that unless the statement could be proved to have been made by the bankrupt whilst he was absenting himself, or immediately upon his return, it could not be admitted as part of the *res gesta*" (b).

TINDAL, C. J.—I think these letters were properly received. They clearly came within that class of evidence which is allowed to shew the effect of an equivocal act. The letters serve to shew that the bankrupt was a needy man, and give a reason for his absence from *Stafford*.

The other judges concurred.

Rule refused.

(a) 1 Moo. & Rob. 210.

(b) See *Ridley v. Gyde*, 9 Bing. 349, where the act of bankruptcy relied upon was a warrant of attorney and bill of sale given by the bankrupt to the defendant on the 25th of *October*, 1830, and constituting a fraudulent preference made in contemplation of bankruptcy; and on the trial the plaintiffs were allowed to give evidence of a conversation which took place between

the bankrupt and the witness on the 20th of *November* following, respecting this assignment. On motion for a new trial, the Court (*dissentiente, Gaselee, J.*) held, that the evidence had been properly received, and the Lord Chief Justice said, "The Court must in each case consider whether the declaration proposed to be received does or does not come within a reasonable time of the disputed act."

DAVIES and Wife, Demandants; WILLIAM SELBY LOWNDES,
Tenant.

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April 27th and
28th.

WRIT of right, to recover certain estates in the county of *Bucks*, devised by *Thomas James Selby*, who died on the 7th Dec. 1772.

The demandant, *Elizabeth Davies*, claimed to be heir at law *ex parte maternā* to the said *Thomas James Selby*, through his paternal great grandmother. The tenant was in possession of the estates as son and heir to his father, *William Lowndes*, afterwards *William Lowndes Selby*, the devisee named in the will of the said *Thomas James Selby*, as hereinafter mentioned.

The demandant's count set forth the pedigree, which was relied upon. *Plea*: the general issue.

The cause was tried at bar, and Sir *W. Follett*, *Talfourd*, Serjt., and *E. V. Williams*, appeared for the demandants; and Sir *John Campbell* (Attorney-General), *Kelly*, and *R. V. Richards*, for the tenant.

Four knights appeared, girt with their swords, with twelve other recognitors, and after several of them had been sworn, the demi-mark was tendered.

Talfourd, Serjt., objected that it should have been tendered before the recognitors were sworn; but the Court ordered the trial to proceed.

The said *Thomas James Selby*, by his will, bearing date the 10th of *August*, 1768, *inter alia* gave and devised as follows:—"To my right and lawful heir at law (for the better finding out of whom I direct advertisements to be published immediately after my decease in some of the public papers), all my manors, lands, &c., in *Buckinghamshire* [including the manor of *Whaddon*] to hold the same to my heir at law, his heirs, executors, administrators, or assigns for ever, chargeable nevertheless with the payment of all my just debts, funeral charges, bonds, annuities, and all legacies hereinafter mentioned; that is to say, to my cousin, *Temperance Bedford*, I give one thousand pounds; to Mr. *Franklyn*, who married Miss *Elizabeth Wells*, I give 1000*l.*; and to Miss *Nelly Wells* and Mrs. *Franklyn*, late *Catharine Wells*, I give 100*l.* each; to Mrs. *Ann Kent*, sister to *Temperance Bedford* before mentioned, 1000*l.*; all which debts, together with all which legacies, general charges, and appointments, I do hereby order and direct to be paid by the said heir at law, his heir, executor, or assigns, within twelve months after my decease; but should it so happen that no heir at law is found, I then do hereby constitute and appoint *William Lowndes*, Esq., of *Winslow*, in the county of *Buckingham*, and now major in the militia, my lawful heir, on condition he changes his name to *Selby*; and I give the estates, and all the manors before mentioned, together with all rights, hereditaments, members, and appurtenances before mentioned, to the aforesaid *William Lowndes*, subject to and chargeable nevertheless with all the legacies, annuities, debts, funeral charges, and other charges before mentioned. [The testator then devised other

1. *Thomas James Selby* devised estates in fee, in the following words: "to my right and lawful heir at law, for the better finding out of whom I direct advertisements to be published immediately after my decease in some of the public papers," and then he added, "that if no heir at law was found, he constituted *William Lowndes* his lawful heir, on condition that he changed his name to *Selby*." The testator knew that he had cousins alive *ex parte maternā*, and the estates were chargeable with the payment of legacies within twelve months after his decease.—*Held*, that the testator intended to designate an heir of the blood of the *Selbys*, and not an heir *ex parte maternā*.

2. *Semble*, that the condition as to taking the name of *Selby*, was satisfied by using it in conjunction with that of *Lowndes*, and that it was unnecessary to obtain a sign manual from the king.

3. For the purpose of shewing the right under which the tenant held the lands, certain decrees in chancery touching the title to the same lands, made in a cause in which other parties were claimants, were held admissible in evidence.

4. Where a fine was levied by the devisee, by his new name of *Selby*:—*Held*, no objection, the lands being properly described. *Vide* What would be the effect of the fine if levied by a trustee.

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estates in trust for certain charities.] Next, I give to my dear cousin *Temperance Bedford*, of *Husborne Crawley*, daughter of the late *Arthur Bedford*, minister of *Sharnbrooke* before mentioned, 1000*l.* over and above what is before recited, this being part of my personal estate, together with all interest that is or shall become due; and which 1000*l.* is out at use, and lent by me to Sir *Thomas Alston*, Bart. of *Odell*, in the county of *Bedford*; and I do also give and bequeath to the said *Temperance Bedford* the two pictures of my mother that hang up in my study; also the picture of my grandmother; also an iron chest, now in the hands of Mr. *Hoare*, my banker, in *Fleet-street*, containing my mother's jewels and some other trifles: and also my mahogany chest of drawers in the dressing-room at *Wandon*, together with my mother's picture and other family pictures; together with all notes, bonds, moneys, and whatsoever else is contained in the same. I also give to the aforesaid *Temperance Bedford*, her heirs, executors, administrators, and assigns, for ever, after the decease of my dearly beloved Mrs. *Elizabeth Hone*, commonly called or known by the name of *Vane*, all that my dwelling-house at *Wavenden*, together with all messuages, farms, lands, tenements, hereditaments, and premises, with their appurtenances, at *Wavenden*, otherwise *Wandon*, aforesaid, &c. I do also give and bequeath to the said *Temperance Bedford*, the perpetual advowson and disposal of the living or rectory of *Wavenden* aforesaid, for ever, together with the tithes of all sorts thereof."

John Lord, *Richard Filkes*, and Mrs. *Hone*, were appointed executors and executrix. The testator had cousins on his mother's and grandmother's side at the time of his death, one of whom was the *Temperance Bedford*, named in his will.

The *Attorney General*, for the tenant, relied upon four points:—*First*, That under the terms of the testator's will, the right heir was bound to appear within one year after his death. *Secondly*, That as heirs were existing on the part of the paternal grandmother, they were to be preferred to Mrs. *Davies*, who claimed through the paternal great grandmother (*a*). *Thirdly*, That the testator clearly meant to designate as his heir, "*an heir of the blood of the Selbys*, and that he did not intend to denote an heir *ex parte maternâ* (*b*). *Fourthly*, That a fine, with proclamations, had been levied of the estates by *William Lowndes*, the devisee, in *Trinity Term*, 1784.

(*a*) It became unnecessary for the Court to decide the first and second points. It appeared that heirs of the paternal grandmother were in existence, and the counsel for the tenant relied upon Mr. Justice *Blackstone's* argument, 2 *Black. Com.* 238, as to the priority of the right of succession between Nos. 10 and 11 in the pedigree, as there discussed. On the other hand, it was contended by the counsel for the demandants, that the Stat. 3 & 4 W. 4, c. 106, sec. 8, was *declaratory* of the law upon this subject, and was therefore an additional authority against Mr. Justice *Blackstone's* opinion.

(*b*) In support of this view of the case, which was the point upon which the Court ultimately gave an opinion, the *Attorney-General* read from Mr. *Gurney's* notes, taken at the time, and preserved by the

Lowndes family, two decisions; one of Lord *Mansfield* in 1780, and another of the Court of Common Pleas in 1781. The judgment of Lord *Mansfield* (see post 131) was given at a trial at bar, on the 22d April, 1780, in the Court of King's Bench, wherein certain persons, who also claimed to be heirs at law *ex parte maternâ*, to the said *Thomas James Selby*, were demandants, to recover the same estates from the father of the present tenant. The judgment of Lord *Loughborough* (see post, p. 132) was delivered in the Court of Common Pleas on the 1st of June, 1781, upon a special verdict found at the *Bucks Lent* assizes in 1781, in an ejectment between the same parties. The notes of the judgments were authenticated by memorandums on the briefs of *Serjeants Hill* and *Rooke*, who were in the causes. The demandant's counsel in his

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By the evidence produced in support of the tenant's case it appeared that, upon the death of the testator, the devisee, *William Lowndes*, had entered into possession of the estates. The court rolls of the manor of *Whaddon* were produced, by which it appeared that *Mr. Lowndes* had held courts as lord of the manor, by the name of *William Lowndes*, from 1774 to 1781. No courts were held from 1781 until *November* 1783, when he held a court by the name of *William Lowndes Selby*: in 1784, by the name of *William Selby*, formerly *William Lowndes*; and after that time by the name of *William Selby*. It also appeared that various persons had claimed the estates of the testator under the will, and that they had taken proceedings at law and in equity to establish such claims. The proceedings in equity were a decree in *Chancery*, dated 23d of *April*, 1779, upon two bills, one filed by *Mrs. Hone*, the executrix of the testator, against *William Lowndes* and others, and the other filed by *William Lowndes* against *Margaret Wells* and others; by that decree the bills were ordered to be retained for twelve months, and in the meantime *Margaret Wells*, and other claimants, were ordered to bring an ejectment to recover the premises at law (c); and by a final decree in these two causes, dated the 28th *March*, 1783, the Court, amongst other things, directed the appropriation of the moneys which had been received for the rents of the *Whaddon* estates, by the said *William Lowndes Selby*, the receiver; and further declared, that the premises devised by the testator to *William Lowndes Selby*, were to be considered as belonging to him, and it was ordered that he should be let into possession thereof, and that all the title deeds and writings relating thereto should be delivered to him. In the course of the trial

Sir *W. Follett* objected to the admission of these decrees in evidence.—The demandants claim by title paramount to the parties to these proceedings in equity, and the demandants are not parties or privies to them. These suits might have been altogether collusive, and the decrees are *res inter alios gesta*.

The *Attorney-General*, *contrd.*—The decrees are offered for the purpose of shewing in what character *Mr. Lowndes* was in possession of the estate at the time they were made. That he was first a receiver of the rents under the direction of the Court, and was afterwards declared the devisee of the estates under the will.

TINDAL, C. J.—There is no objection to the admission of these decrees for the purpose of shewing the right in which *Mr. Lowndes* then held the estates, but they are not conclusive as to that right. As to the objection that they are *res inter alios gesta*, it is usual in many cases to admit in evidence writs and judgments, in actions against third persons, for the purpose of shewing the character of a transaction.

In continuation of the tenant's case it was also proved, by the production of the title deeds, that the estates in *Bucks* were purchased by the testator, his father, and grandfather, at different periods, between the years 1653 and

address to the jury, objected that these decisions were not to be found in any Book of Reports. As the doctrines advanced by Lords *Mansfield* and *Loughborough* are recognized and confirmed in the present

case, it has been thought proper to print the judgments at length.

(c) These proceedings at law are detailed in the last note (b).

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1763 (d), and the fine with proclamations, levied by *William Selby*, the devisee, by the name of *William Selby*, in *Trinity Term*, 1784, was also proved.

Talfourd, Serjt., on behalf of the demandants, addressed the grand assize. Upon the effect of the fine levied in 1784, he submitted that *William Lowndes* was a mere trustee for the right heir until he should be discovered, and that therefore it did not operate adversely. Another objection to the fine is, that it was levied by the devisee, by the name of *Selby*, whereas he was only known to the world by the name of *Lowndes*, and under that name he had held possession of the estates. The fine must therefore be considered void.—[*Tindal*, C. J.—You do not deny that the lands are properly described.]—No. Upon the conclusion of *Talfourd's* address

The *Attorney-General* suggested whether the tenant's case was not so clear upon the two last points upon which he relied, as to make it unnecessary for the demandants to prove their pedigree, inasmuch as if it was established, it would not avail them.

TINDAL, C. J.—It does seem to me unnecessary to proceed any further with the case, because we should, in point of law, decide against the demandants' claim if the pedigree was proved.

Talfourd, Serjt. then tendered a bill of exceptions; whereupon the Court directed the trial to proceed; and much evidence was received in support of the pedigree (e).

The following is the substance of the charge to the grand assize.

TINDAL, C. J.—You are summoned to determine by your recognition, whether *William Selby Lowndes*, the tenant of the lands in dispute, hath more right to them than the demandants, *John Davies* and *Elizabeth* his wife.

The demandants claim under a pedigree, whereby *Elizabeth Davies* claims to be heir at law of *Thomas James Selby*, the person last seised; on the other hand, the tenant, Mr. *Lowndes*, says, that he is entitled to the estates, as heir at law to his father, who is the devisee named in the will of the said *Thomas James Selby*. There are, therefore, two questions, one of which is a question of law, and the other a question of fact. There is no doubt but that *Thomas James Selby* died seized of the estates in question, on the 7th December, 1772. The period of time within which a writ of right must be sued out is 60 years, and it appears that the writ, in this case, was sued out on the 6th of December, 1832, which is exactly one day before the expiration of that

(d) Lord *Manfield* notices the effect of these purchases in his judgment, *post*, 131.

(e) It is not necessary to go into the facts relating to this part of the case. The pedigree was clearly traced as far back as to *James Lloyd*, of *Monington*, in *Pembrokeshire*, who died in 1670. To prove the relationship of the testator's family and this *James Lloyd*, his will was produced from the Consistory Court of *Carmarthen*, dated 3d September, 1669, and that contained a remarkable bequest in the following words:

"To *James Selby*, of *Warenden*, in the county of *Buckingham* [which answered the description of the grandfather of the testator], the son and only issue of *Thomas Selby*, of *Nevern*, in this county, by my sister *Mary*, his deceased wife, I give the sum of fortie pounds." It was strongly contended by the counsel for the tenant, that this will, which was the only link to connect the two families, was a forgery. The particularity of the description of *James Selby* was the subject of much observation.

period.—[After some preliminary observations upon the case generally, and upon the evidence given in support of the pedigree, which are not material, the learned judge said,]—But if you are of opinion that the demandant has not failed in proving her pedigree, then it becomes my duty to state to you what is, in point of law, the effect of the devise in question, and also of the fine which was levied in 1784.

First, what estate did *William Lowndes* take on the death of the testator? And we are all of opinion that the devise was one, which, under the circumstances, vested the estate in fee-simple in *William Lowndes*, the devisee, upon the failure of an heir of the blood of the *Selbys*. It appears that the father of the testator died when he, the testator, was not more than four years old, and his mother when he was about eleven. He was undoubtedly aware that he had relations living on his mother's side, but it is impossible to read this will without seeing that he had not any knowledge of an heir, bearing the name of his own family. That being so, he says in his will, "I give and devise to my right and lawful heir at law (for the better finding out of whom I direct advertisements to be published immediately after my decease in some of the public papers), all my manor of *Whaddon* and *Nash*." The first question, therefore, is, what is the meaning of the testator in using the words "my right and lawful heir?" In their general and unlimited sense, they would mean an heir *ex parte maternâ*, or *ex parte paternâ*, and would carry within their sweep any persons, at any distance, who could trace out their consanguinity. But although these words are used so generally in the first part of the devise, we think they are cut down and restrained to a more particular sense, and that they denote an heir of the blood of the *Selbys*. This is manifest, for in the first place, if he had intended that any heir should inherit the estates, he need not have made the devise at all, for the law would have given the property to the heir, however remote he might be. He also gives the estate to Mr. *Lowndes*, upon condition "that he changes his name to *Selby*," which shews that he wished that his heir should have the name of *Selby*, and this brings one's mind very far to the conclusion, that he intended by the advertisements to search for an heir of the blood of the *Selbys*, for in failure of such an heir he makes a stranger his lawful heir, upon condition that he takes that name. But the matter does not rest here. The testator actually knows, that there are persons living who would be his heirs in the larger and unlimited sense, and yet he passes them by and merely gives them a legacy; for in one part of his will he gives a legacy to *Temperance Bedford*, whom he describes as his cousin, and he afterwards leaves the advowson of *Wavenden* to the same person. In endeavouring, therefore, to discover what the intention of the testator was, we find that he gives, in the largest and most general way, his estate at *Whaddon* to his lawful and right heir; and we find afterwards a person described in his will, who was his heir, in case no nearer heir *ex parte maternâ* could be found, and yet he passes her over, and merely gives her a legacy: Therefore upon that ground I should say it is clear that the testator meant to describe heirs *ex parte paternâ*. There are other reasons which have occurred to us, namely, that there is something unusual in the terms of the devise to Mr. *Lowndes*. The testator does not say that if any heir cannot be found, then, that he devises to him; but, he designates him his "heir at law." He says "if it should happen that no heir at law is found, I then do hereby constitute and

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appoint *William Lowndes*, Esq. my lawful heir," making him, as by the old Roman law, his adopted heir; a person standing in *loco hæredis*. And then we must add that there are certain duties to be performed by this heir; he is charged with the payment of legacies and annuities, which are charged upon the estate; it therefore became necessary that the devisee should take the estate that he may raise those charges by sale or mortgage. How then can we say that he intended that this should be ambulatory during sixty years? for in that case the objects of his bounty would all, undoubtedly, be dead. Looking, therefore, at these circumstances, which are strong indications of the intention of the testator to use the words in a limited and restrained sense, we hold, that the heir at law, whom the testator first meant to describe, was an heir of the blood of the *Selbys*; and no such heir having been found, and the demandant not being such heir, the devise to *William Lowndes* was a good and valid devise. I shall not enter into a discussion of the two other points which have been made, as it is unnecessary to discuss them; but there is one relating to the fine to which I will call your attention. It appears that after the death of the testator, there were certain proceedings taken in *Chancery*, and that in the course of these proceedings Mr. *Lowndes* was appointed receiver of the rents of the estate, and that whilst he remained receiver he held the courts of the *manor* by his name of *William Lowndes*. I do not think he could have done otherwise, for at that time he was a public officer of the Court of *Chancery*. After that a final decree in the cause was made, and from that time the court rolls shew, first, the addition of *Selby* to his name, and afterwards the dropping of his own name, and the use of the name of *Selby* alone. By the decree he was in the receipt of the rents and profits of the estate; and the only question of fact is whether he was receiving these rents as actually in the dominion of the estates in his own right, asserting the freehold to be his own; or whether he went on receiving them as a trustee, to be accountable thereafter to other persons. It appears to me that he received that which he conceived and claimed to be his own, in his own name, and in his own right. And if that is so, then this fine which was levied by him is a good fine in a court of law; for if he had the freehold in him, by right or wrong when it was levied, it would be a good fine. If on the other hand, he was a mere trustee for other persons, I am not prepared to say that the fine would not be a good bar in a court of law, although a court of equity might hold him still responsible to those persons for whom he was a trustee. But if you are of opinion that Mr. *Lowndes* was in the receipt of the profits, claiming them as his own, then this was clearly a valid fine, and after the proclamation and five years non-claim, that would be a bar against all the world, and this point alone would be sufficient to entitle the tenant to your verdict.

A question has been asked by one of the grand assize, namely, whether Mr. *Lowndes*, the devisee, changed his name according to the condition contained in the will. It appears that Mr. *Lowndes*, whilst he acted as receiver of the rents of the estate, used his own name in holding the courts. After that time he used the name of *Selby* in conjunction with that of *Lowndes*, and I am not prepared to say that that would not be a sufficient observance of the testator's direction. But at all events he afterwards changed it entirely, and omitted the name of *Lowndes*. It is not necessary to make any application for a royal sign manual for leave to change a name.

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It is a mode which is often adopted for the purpose of giving a greater publicity to the change, but there is nothing to prevent a person from changing his name, and he may, provided it is not done for a fraudulent purpose, work his way in the world with his new name as well as he can. Therefore this is not an objection which can succeed. But this is an objection which will not arise if the fine has been duly levied; or if the demandant has failed in establishing her pedigree; and it is equally out of Court, if this will is one, as we think it is, which intended only to benefit an heir of the blood of the *Selbys*.

Before the Recognitors retired to consider their verdict, *Talfourd* tendered his bill of exceptions, which excepted to the opinion delivered by the Court, upon two grounds. *First*, Upon the construction given to the devise; and *Secondly*, Upon the effect of the fine and proclamations.

The Lord Chief Justice said, that in the trial of a writ of right, a special verdict could not be given.

The grand assize found a verdict generally for the tenant (*f*).

(*f*) It appeared that the grand assize were not all agreed whether the pedigree had been proved.

DORRIS d. ELLEN WELLS and others v. W. LOWNDES.

(In the King's Bench.)

Upon a trial at bar of this cause (see *ante*, p. 186, note b.) Lord Mansfield, addressing the jury, said:—The question is a question of construction, analogous to a question of identity; for the whole turns on this, Whom did the testator mean by "my rightful heir, whom I don't know; my rightful, lawful heir?" And it is very different from what the case would have been if he had said, "I give to Mr. Lowndes my estate in case no heir is found," or, "I give him the estate until an heir shall be found;" then Mr. Lowndes could retain nothing, if there were any one who could claim by descent; but that is not the case; for here is a gentleman who has estates purchased by his grandfather, estates purchased by his father, and estates purchased by himself; and all of them come within the local description that is the subject matter of this devise. An heir *ex parte paternâ*, an heir of the blood of the *Selbys*, would certainly take them all. But suppose there is no heir upon the part of the father, and the estate is to go in descent on the part of the mother, grandmother, and great grandmother, who shall be his heirs depends upon the title to the estate. If it be an estate purchased by himself, it goes one way; if purchased by his father, another way; if by the grandfather, it goes another way; because you must go a line back; for the wife can never inherit to her husband, or any body claiming under her: you must go back to get to the blood. And if that is the case, who is

the person here described? for here are three right and lawful heirs when the rule of who is heir is taken from the subject-matter. If I speak of an heir applied to borough *English* lands, I speak of the younger son; if I speak of an heir in *Kent*, gavelkind; if I speak of the heir general, or an heir in tail, they all take by description from the subject-matter. But this testator describes a person to whom, as his rightful heir, he gives the whole: that places the Court under the necessity of finding out a meaning for this expression, rightful heir; and that is to be collected from circumstances. Just as if a father had two sons of the name of *John*, and left property to his son *John*, you must find out from collateral circumstances which he meant. Now, it strikes me, this man meant an heir upon the part of his father; and that he should be of the name of *Selby*; and that appears from various circumstances. In the first place, it appears this gentleman's grandfather and a brother came into *Buckinghamshire* from the north country: they either did not know much of their families, or their families, perhaps, were so obscure and low, they did not publish it in *Buckinghamshire*; but they rose to good circumstances and a certain degree of consequence in life. Then they rose much higher by means of the great fortune they acquired by the serjeant. But the serjeant had not traced back his pedigree in the north, and nobody was able strictly to find out what his family was, nor to whom they belonged. As to the testator, Mr. *Selby*, he knows very well his relations upon the part of his mother; and he knows his relations upon the part of his grandmother, his grandfather's wife. But the heir in view, the object of his bounty, is a person he does not know—a person not found—but a person to find whom he desires

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advertisements to be put in the paper. The relations he did know, he did not mean to enjoy the estate if there was no heir preferable to Mr. *Lowndes*: for he knows the *Bedfords*, he knows the *Wells's*, he knows the *Alstons*; he gives to some very bountiful legacies, and he gives to Mr. *Lowndes* the estate, unless an heir shall be found. He describes *Temperance Bedford* by the terms of his dear cousin; he describes the plaintiffs who are now claiming, and he gives them all legacies; and it is admitted in the case he perfectly knew they were his relations. If any of these are his heir, he knew nothing of it, and supposes him a person yet to be found, and unless that heir is found, whom he knows nothing of, *Lowndes* is to have the estate. The inference is very strong, in my opinion, that he meant an heir upon the part of his father; and unless an heir upon the part of his father was to be found, a person he did not know, he meant the estate should go to Mr. *Lowndes*. All the circumstances are admitted; therefore I do not know what to leave for you, but to find a verdict for the defendant.

Verdict for the Defendant.

DOE d. ELLEN WELLS and others v.
LOWNDES.

(In the Common Pleas.)

UPON a special verdict found at the *Bucks Lent* assizes, 1781 (see *ante*, p. 126, n. b.), Lord *Loughborough*, C. J., delivered the following judgment:—

On the part of the lessors of the plaintiff, it is contended, in the first place, that they are entitled to all the premises under the will, they being the persons described in that will under the denomination of the right and lawful heir of the testator.

In the second place, it is contended that, if they are not so entitled, yet they are entitled by descent to all the premises, excepting the estate at *Little Harwood* and the leasehold; that they take by descent, as heirs at law, the limitation over to the defendant, Mr. *Lowndes*, being an executory devise, too remote, and therefore void.

This last point was started, and very ingeniously argued upon the second argument; and at first view, perhaps, there is somewhat specious in it. I will take notice of it first, in order to lay it aside, because it appears to be merely specious. The argument upon that point proceeds thus:—There is in this will a devise to the right and lawful heir and his heirs. There is then a devise to *William Lowndes* and his heirs. This latter devise, it is contended, cannot take effect as a vested estate, because it would be a fee upon a fee; it must therefore be executory, and if it is executory, it is too remote, for the commencement of it is indefinite. The whole of this argument seems to me to be an obvious fallacy. It is said that there is a devise here to the right and lawful heir and his heirs: it is true that there is a clause in the will, respecting the

disposition of the estate, prior to the devise to *William Lowndes*; but whether in that clause of the will there is contained a devise of the estate or not, is the very question in the cause. If the person is ascertained to whom the estate is given under that clause, then it is very clear that no estate is given to *William Lowndes*; not because the devise to him is too remote, but because upon that supposition there is nothing given to him. The prior devise, as it is a little improperly called in the argument, is to a person not named, but described—whose existence is doubtful, but not eventual. Whether at the death of the testator there doth or not exist a person to whom the description applies, is a certain though it is an unknown fact. If there does exist such a person, nothing is given to Mr. *Lowndes*; if there does not, the estate vests immediately in Mr. *Lowndes*: therefore there is no objection to the legality of the devise to Mr. *Lowndes* in the creation of that devise. Whether it obtains in his favour or not, may not be exactly known, at the death of the testator; but it is absolutely certain, if there is a person answering to the description of that clause prior to the nomination of Mr. *Lowndes*, that person takes, and Mr. *Lowndes* never can take. On the other hand, if there is no such person as answers to that description, Mr. *Lowndes* takes; and the estates vest in him. Neither would it make void the devise to *Lowndes*, though it were admitted in the argument, and though it were expressed in the will, that the purpose of inserting his name in the will was to prevent an escheat. The authorities upon that point cited by Mr. Serjt. *Hill* are all true. It is true that no estate can be created by a will that is against the rules of law; but there are no rules of law that either by will or deed a grantee or feeoffee should not take against the lord.

The case then comes entirely to depend upon the first question, and that is, whether the lessors of the plaintiff are entitled to take under the description of right and lawful heir of the testator, *Thomas James Selby*.

But before I come to consider the parts of the will from whence the exposition of these words is argued upon either side, it may be proper to observe, that the common topic of argument from the favour due to the heir at law, is totally inapplicable to the present case. The lessors of the plaintiff are relations to the testator, but they do not claim by descent: in this case they certainly have no legal right to the leasehold estate, and they have as little right to one part of the freehold, a small part indeed, but still a part of that which is comprised in the general devise: they, as well as the defendant, Mr. *Lowndes*, claim, and can only claim under the will. When they therefore introduce themselves as claimants under the will, it is not just reasoning to talk of the favour that is due to heirs at law. But, perhaps, it would not be quite fair to dismiss this topic without a little more observation upon it. It is an established rule laid down

is many and very ancient authorities, that as heir at law is not to be disinherited without express words, necessary implication, or declaration plain. The foundation of the rule is obvious and plain. The right of the heir by descent is certain, and therefore he is not to be disinherited: and the rule always speaks of an heir at law, in the character of heir, and taking by descent. The law gives an estate to the heir if there is no other person to take it; and he who claims is opposition to that clear, undoubted, and certain right, must shew a better title: therefore no doubtful, no ambiguous, and no uncertain intent shall take away the clear right of the heir at law. Let us consider, then, in the present case, whether there are any of the contending parties that stand in the situation of the heir at law claiming by descent. Here is a will produced, to which both parties resort: in that will the name of *William Lowndes* is found; and there can be no hesitation as to his identity. The only question is, whether the three lessors of the plaintiff, *Elizabeth Wells* and the two *Franklyns*, are described in the devise antecedent to the devise to *Lowndes*. Unless their title can be made out clear, *Lowndes'* title is clear and certain upon the will. Upon examining the argument upon the interpretation of the clause, we must allow that they are relations, and that they are relations capable of succeeding, and that, therefore, they are entitled that no words shall be strained or forced to exclude them.

On the part of the lessors of the plaintiffs, the great argument (for all that was urged in the case results to this argument, and supports one or other of the propositions contained in it)—the great argument was this:—the testator, it is said, was ignorant who personally was his heir; he was even ignorant to what relation, by the rules of succession, the character of heir would belong; but, whoever the persons, and whatever their right, the testator meant to describe their legal title; and his intention was, that the law should name his heir. Upon this proposition the whole of the plaintiff's case depends, and it will be necessary to examine the several parts of it. That the testator was ignorant of who personally was his heir—that he did not know the individual or individuals who were to succeed in that character—is certainly true, and I take it to be the only certain part of this argument. I rather believe that the testator did not know that there might be some possible relation whose claim would extend to all the lands, that either he, his father, or grandfather had acquired, whose right he meant to preserve, to whom it might be necessary to give the leasehold estate, and whom he likewise sought to charge with the legacies. The words he has used are certainly but ill adapted to convey that idea; for a person that I have described would be a person of the blood of the *Selbys*, who would succeed to the entire estate, whether descended from the grandfather, the father, or of his own purchase, and would be the

general representative of that family which he wished to establish. But this I state only as a matter of conjecture. I hold it to be certain that the testator did not know who the person was, for he directed means to be used to find out the person. I do not hold it to be certain that the testator was ignorant what right the law threw upon particular classes of relations. But I take it to be by no means true that the testator meant that the law should name his heir; for I think it is as plain as it can be made by any instrument, that the testator has with great anxiety endeavoured to guard against this. One observation on the whole will is, that the idea of family is very strongly marked; continuing the name, and being represented in his possessions, and in his seat in the country; and throughout the whole of the will it certainly would be straining exceedingly, and not only straining but obliterating a great deal of it, to suppose that in this instrument the least idea prevailed of an intestacy: the law, if the testator meant to refer himself to the law, undoubtedly would name in direct opposition to that which is his manifest intent; the law would sever that property which he wished to unite: the law would, for instance, take an acre from the park, and give it to different persons; the law would sever the fish-ponds, for they are upon the leasehold premises; the law would disunite the farm, which it is manifest it was his object and intent to keep united in one hand, namely, the person who was to be his representative. Another thing is extremely strong upon that part of the case. The lessors of the plaintiff come here as heirs at law upon the part of the grandmother, they come to claim under the description in the will all that is comprised in the devise. The foundation of their title is, they are so related as to be his heirs at law on the part of the grandmother: but it is obvious that there is another person to whom a part of the premises comprised in this devise must, exactly upon the same proposition and the same argument, belong; because they are not heirs at law of the grandfather, and to that part of the estate which descends from the grandfather they can set up no title. What becomes of that part of the estate? Does it escheat? will Mr. *Lowndes* take it, if Mr. *Lowndes* stands in the place of that heir at law of the grandfather who would take the whole of the estate? The value of those premises is small; but the value of them does not at all alter the argument, if he stands in the place of the heir at law with regard to that part of the premises. Then there are two parties; the heirs at law on the part of the grandmother, who say his estate belongs to us, because, if there had been no will, it would descend to us. On the other hand, there stands Mr. *Lowndes*, claiming the other part of the estate. The lessors of the plaintiff say they are entitled to it. Why so? only because the greater part of the estate is of that nature that, if there had been no will, it would have de-

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scended to them. Is it to be in average between them when there are two persons whose claims are thus equally balanced, and who neither could qualify any right with respect to leasehold estate? Upon what ground is the Court to say it shall go in average between them?

Upon all these observations, it seems, therefore, that in this will *right and lawful heir at law* cannot possibly mean *every* heir at law. It is contended it would be the heir on the part of the father, though the heir on the part of the mother would be nearer related to the testator. Why? not because the heir of the mother could not be entitled to take by any course of legal descent. Is it more applicable to the heir on the part of the grandmother? The heir on the part of the grandmother is just as much excluded from claiming any part of the estate which comes from the paternal grandfather, as the heir on the part of the mother is precluded from claiming any part of the estate which came from the father. The only person to whom this description seems in all its parts applicable, is the heir on the part of the paternal line, the heir of the blood of *Selby*, who would be, in the common and ordinary acceptation of the word, in the general sense of the country, the representative of the family of the *Selbys*, in whose favour it is probable he meant this devise should operate, and for whom he meant to keep the leasehold estates connected with the freehold, and charged the payment of debts and legacies out of the estate. I say no more than that it is probable, because it is not necessary to carry that argument further; for it must not be forgotten that the lessors of the plaintiff are now called to maintain their right; that they must shew against a clear and specific devise to a person named, of whose identity there can be no doubt, that they come under the words of the will; and, in my apprehension, the argument that is attempted to support their case does not make it out with clearness, with certainty, and with that conviction that is necessary to establish a title against another which undoubtedly is clear. However, the defendant's counsel do not leave the matter upon the imperfection of the argument urged on behalf of the lessors of the plaintiff, for they undertake to shew, on behalf of the defendant, that negatively the lessors of the plaintiff cannot be the persons meant in this will; and there are two circumstances by which they contend that that proposition is made out with a very strong degree of evidence. In the first place, they say, that nothing can be more certain, that the person to whom the testator meant to apply the description of right and lawful heir at law, was one whose person was unknown to him; for he directs that advertisements should be published, immediately after his decease, for the better finding out of that person. Then he is there describing one of whose possible existence he had some idea, but of whose actual existence he knew nothing. Now that, they say, never can

apply to the lessors of the plaintiff, because the lessors of the plaintiff he undoubtedly knew, and one of them, *Elizabeth Wells*, is mentioned by name in the will; and though the names of the other two are not mentioned, yet their mother's name is mentioned. Their father is described, and described by the circumstance that explains his connexion with the testator; he is described as the husband of *Elizabeth*, the female who is in the same degree with them, and married a person of the name of *Franklyn*, who is also named in the will. The object of the inquiry the testator directed to be made was, not to ascertain a point of law, but to discover an unknown person; and it would be ridiculous to suppose he had directed advertisements to find out that which he extremely well knew. The object, therefore, of this description must be some other person than those who were before his eyes, and whom he names. When the testator comes to make a devise in favour of *Lowndes*, he takes care and is anxious that *Lowndes* should assume the name of *Selby*. There is a positive direction in the will, that *Lowndes*, whenever he becomes entitled, shall take the name of *Selby*. Now, if the testator could have conceived that there was any event in which *Elizabeth Wells* and the *Franklyns* might be entitled to claim under the will, it is inconceivable that he who was anxious to make a gentleman abandon his own name, should not be equally anxious to make those assume that name under which he intended the representation of his family should continue. But besides this, there is another circumstance in the will which the defendant's counsel contend, and it seems to me unanswerably, and makes it still more clear that the testator negatively did not intend that the lessors of the plaintiff should be the representatives of his family in possession of his estate, managing that estate, and of course as the heirs of that estate by the will, executing his will with regard to that estate. To *Elizabeth Wells* and to the *Franklyns* there are two legacies given, those legacies are charged upon this estate. The mere circumstance of giving legacies charged upon an estate will not perhaps of itself be sufficient to shew that the legatees could not in any event take the estate out of which the legacies are to issue. But this is not all; the testator has proceeded to give several legacies, and directs that they shall be paid within twelve months, which is the usual time at which legacies are made payable; he directs that they shall be paid by his heir at law within a twelvemonth after his decease; but if it should so happen that no heir at law should be found, he then appoints Mr. *Lowndes* his lawful heir, upon condition that he changes his name; and he gives him the estate charged with those legacies. It is clear, therefore, that the testator supposed a case in which Mr. *Lowndes* might be the person to pay the legacies to *Wells* and to the *Franklyns*. Now that case could not by possibility exist

if *Wells* and the *Franklins* were the persons to answer the description of his right and lawful heir, because they would take the estate, the estate would not come to Mr. *Lovndes*, and Mr. *Lovndes*, therefore, could never be in the situation which the testator has supposed to be a situation likely to happen within a short compass of time. From these circumstances the counsel for the defendant contend, and their argument seems to me to be well founded, that there is sufficient evidence to shew negatively that the heir could not be the lessors of the

plaintiff. The other part of the argument seems to me to shew that the lessors of the plaintiff have not been successful to make out the point that they are the persons intended; the utmost of the argument would be probable conjecture, not very certain, and which in such a case ought not to prevail against a clear title. Mr. *Lovndes's* title is a clear one, unless another be found to bar it; therefore the Court, upon the whole, are of opinion that judgment ought to be for the defendant.

Judgment for the Defendant.

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POTTS v. SPARROW.

April 28th.

ASSUMPSIT by an attorney to recover his bill of costs. *Plea*:—*Non assumpsit*. At the trial before *Tindal*, C. J., at the sittings after *Michaelmas Term*, 1834, it appeared that the action was brought to recover the costs of certain agreements drawn by the plaintiff between the defendant and one *F. Stanley*, at the defendant's request; and also for the costs of an action *Stanley v. Jones (a)*, which had been conducted by the plaintiff for the defendant to enforce one of the agreements. It was objected for the defendant, that the agreements were illegal and void, on the ground of *maintenance*, and that the action, *Stanley v. Jones*, being brought to enforce an illegal agreement, the plaintiff could not recover for the costs incurred. The judge refused to nonsuit on this ground. Verdict for the plaintiff.

In *assumpsit* by an attorney to recover his bill of costs, it cannot be objected under a plea of *non-assumpsit*, that the costs were incurred in preparing and enforcing agreements which had been declared illegal.

Talfourd, Serjt., having obtained a rule *nisi* to enter a nonsuit, in pursuance of leave reserved, upon the ground, that as the transaction was illegal, the plaintiff could not recover,

Comyn shewed cause.—This transaction was not open to the objection as to maintenance, *Wallis v. Duke of Portland (b)*. And the agreement was drawn under the advice of counsel. But that need not be contended; for by *R. Hil. T. 4 Wm. 4*, No. 3, "In every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, must be specially pleaded." Therefore the plea of *non assumpsit* does not raise the objection as to the illegality of the transaction in question.—He was stopped by the Court.

Talfourd, Serjt., and *Dowling*, for the defendant.—No contract arises in respect of services performed in furtherance of an illegal agreement. This is not a mere illegality of consideration, but no work was done which could be the subject of a contract; for the law will not recognize the existence of a contract which is altogether illegal. The rule only applies where the illegality is in an agreement which forms the subject of a suit, and not where the claim is for illegal services which the law will not recognize. The Court would not hear the complaint of a highwayman who filed a bill against his

(a) See 7 Bing. 369; S. C. 5 Moore & P. 193.

(b) 3 Ves. Jun. 503.

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companion for an account of the profits obtained by their exploits on *Hounslow Heath*.

TINDAL, C. J.—The last argument applies to those cases where a transaction is shewn to be altogether unlawful; but I never heard that if the defendant omitted to prove the illegality of a transaction, in a proper manner, that the Court must do it for him. The question we now have to decide is, whether the defendant ought not to have shewn the alleged illegality of the transaction upon the face of his plea, and we think he ought to have done so. It has been very acutely argued, that the rule only applies where the illegality arises on the agreement which is the subject of the suit, and not to cases where the claim is for illegal services, and upon which, therefore, no implied contract could arise; but this seems to be a distinction without a difference. Many cases occur where the claim is in respect of services performed which would be clearly illegal, and yet the defendant would be called upon to plead the illegality, although no express contract would be proved at the trial. As the defendant relies upon the illegality of the contract, he ought to have put that defence upon the record.

PARK, J.—In an action of assumpsit, if a defendant now wishes to rely upon the illegality of the transaction, he must put it on the record; and that whether the illegality arises upon the statute or common law of *England*. If there is no such plea upon the record, I am not prepared to say whether a judge would not be bound at the trial to stop any cross-examination which led to disclose any illegal circumstances affecting the transaction which was the subject of the action. I give no positive opinion upon this point; but I doubt whether it would not be a proper course.

GASELEE, J., concurred.

VAUGHAN, J.—I think the terms of the rule are imperative.

See *Barnett v. Glossop*, ante, 94.

May 13th.

GIBSON and an^r, Assignees of DAVID RANKINE, a Bankrupt,
 v. BELL.

1. The assignees of a bankrupt brought an action against defendant, without alleging special damage, for not accepting a bill of exchange, in pursuance of an agreement made on balancing accounts with the bankrupt, to which defendant pleaded a set-off for money lent and money received to his use:—*Held*, that the transaction was “a mutual credit,” within sec. 50 of 6 Geo. 4, c. 16, and that the plea of set-off could be maintained.

2. There were two counts in the declaration; defendant pleaded a set-off to the first count, and by a separate plea, a set-off to the second count. *Quere*, Whether such a mode of pleading is good.

THE declaration stated, that *Rankine*, before he became bankrupt, had sold to the defendant, and the defendant had then purchased of said *Rankine*, divers, to wit, five butts, seven hogsheads, and two quarter-casks of wine, and 166 bottles of wine, for certain prices, amounting to the sum of 535*l.* 10*s.* and that the defendant had in part payment thereof accepted three several bills of exchange, respectively bearing date the 31st of Oct. 1833, drawn by the said *Rankine* upon the defendant, to wit, a certain bill of exchange for 165*l.* 3*s.*, payable six months after the date thereof, a certain other bill of

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exchange for 165*l.* 3*s.*, payable nine months after the date thereof, and a certain other bill of exchange for 165*l.* 4*s.*, payable twelve months after the date thereof; that it was agreed by and between the defendant and the said *Rankine*, that the defendant should deliver to the said *Rankine*, in further payment, and on account of the said sum of 535*l.* 10*s.*, a pipe of port wine, valued at 50*l.*, more or less, and that any difference there might then be between the sum to which the said three several bills of exchange and the price of the said pipe of port wine should amount, and the said sum of 535*l.* 10*s.* so to be paid by the defendant to the said *Rankine* for the first mentioned wines as aforesaid, should become and be the subject of future arrangement between them, the defendant and the said *Rankine*; and thereupon, before the said *Rankine* became bankrupt, and before the said bill of exchange thereinbefore firstly mentioned became due and payable, to wit, on the 25 day of *Nov.* in the year aforesaid, in consideration that the said *Rankine*, at the request of the defendant, would cancel and destroy the said last-mentioned bill of exchange for 165*l.* 4*s.*, and would not require the defendant to deliver the said pipe of port wine according to the said agreement. he, the defendant, promised the said *Rankine*, before he became bankrupt, to accept divers, to wit, three other bills of exchange, to be drawn by him the said *Rankine* upon the defendant, to wit, a bill of exchange to bear date the 15th day of *Nov.* in the year aforesaid, for 45*l.*, three months after the date thereof, another bill of exchange to bear date the 25th day of *Nov.* in the year aforesaid, for 50*l.*, three months after the date thereof, and a third bill of exchange for 110*l.* 3*s.*, to be drawn at such time, and to bear such date as to allow the defendant ten months from the said 31st day of *October* for the payment of the said sum of 110*l.* 3*s.*, *being the balance then due and owing from the defendant to the said Rankine upon the account aforesaid*, and to deliver the said last-mentioned three bills of exchange to the said *Rankine*, so accepted as aforesaid, when he the said defendant should be thereunto afterwards requested. And the plaintiffs, assignees as aforesaid, averred that the said *Rankine*, confiding in the said promise of the defendant, did, before he became bankrupt, and also before the said bill of exchange thereinbefore firstly mentioned became due, according to the tenor and effect thereof, to wit, on, &c., cancel and destroy the last-mentioned bill of exchange, of which the defendant then had notice, and although the defendant in part performance of his said promise, did afterwards, and before the said *Rankine* became bankrupt, to wit, on, &c., accept the said two several bills of exchange for the payment of the said sums of 45*l.* and 50*l.*, and deliver the same so accepted to the said *Rankine*, and although he the said *Rankine* did also, on, &c., draw upon and deliver to the defendant a certain other bill of exchange, at such time, and bearing such date as would allow the defendant ten months from the said 31st day *Oct.* for the payment of the said balance, to wit, the 2d day of *January*, 1834, for the payment of the said sum of 110*l.* 3*s.* eight months after the date thereof, and did then request the defendant to accept the said last-mentioned bill of exchange, and to deliver the same so accepted, to him the said *Rankine*; and the plaintiffs, assignees as aforesaid, afterwards, and after the said *Rankine* became a bankrupt, to wit, &c., and often afterwards, did also request the defendant to accept the said last-mentioned bill of exchange, and to deliver the same so accepted to them, the plaintiffs, as assignees as aforesaid; and

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although the said *Rankine*, before he became bankrupt, and the plaintiffs, assignees as aforesaid, since the said *Rankine* became bankrupt, had not at any time required the defendant to deliver up the said pipe of port wine to the said *Rankine*, or to the plaintiffs, assignees as aforesaid, yet the said defendant, not regarding his said promise, but contriving, &c. to deceive and defraud the said *Rankine*, before he became bankrupt, and the plaintiffs, assignees as aforesaid since the bankruptcy of the said *Rankine*, did not nor would, when he was so requested as aforesaid, accept the said last-mentioned bill of exchange, or deliver the same so accepted to the said *Rankine* before he became bankrupt, or to the plaintiffs, assignees as aforesaid since the bankruptcy.

There was a second count, for money due to *Rankine* before the bankruptcy; for goods sold and delivered; for money lent; for money paid to the defendant's use; for money had and received by plaintiff; and on an account stated.

Pleas.—*First*, Defendant saith that he did not promise in manner and form as the plaintiffs had above complained against him. *Conclusion* to the country.

Second Plea.—And for a further plea in this behalf, as to the first count of the said declaration, the defendant saith, that before and at the time of the date and issuing forth of the *fiat* in bankruptcy under which the said *Rankine* was adjudged to be such bankrupt, to wit, &c., the said *Rankine* was indebted to the defendant in 300*l.* for money lent to the said *Rankine*, and for money by the said *Rankine* before then had and received to the use of the defendant, and that the said sums of money from thenceforth hitherto had been and still remained wholly unpaid to the defendant; and that the defendant had not, when he gave credit to the said *Rankine* in respect of the said sum of money, notice of any act of bankruptcy by the said *Rankine* committed, which said sum of money so unpaid and satisfied, exceeded any demand of the said *Rankine*, before his bankruptcy, and of the plaintiffs, as assignees as aforesaid since the said bankruptcy, in respect of the matters in the said first count alleged, of all which premises the plaintiffs had notice, and out of and against which said sum so unpaid and unsatisfied as aforesaid, he the defendant was ready to allow and set the full amount of such demand. *Conclusion* with a verification.

Third Plea.—And for a further plea to the said declaration, *except so far as related to the said first count*, the defendant pleaded a set-off in the same words as in the above second plea.

Replication.—As to the *first* plea, *similiter*.

As to the *second* plea, a demurrer for the following causes: that is to say, that the said debt in that plea mentioned as due to the defendant, and the said cause of action in the first count of the declaration mentioned, were not mutual debts or mutual credits, capable of being set off against each other, and that the cause of action in that count was not one to which a set-off could be pleaded; and also, that the said second plea was pleaded to the first count only of the declaration, whereas if the cause of action in that count was one to which a set-off could be pleaded, then, as the causes of action in the residue of the declaration were also of a kind to which a set-off might be pleaded, a plea of set-off to the first count severally, accompanied by another plea of set-off to the residue of the declaration severally, was

manifestly insufficient, because it amounted to no more than this, that the bankrupt was indebted to the defendant to an amount equal to or greater than a part of the amount which the plaintiffs, as assignees of the bankrupt were entitled to claim of the defendant; and also, that the second plea tended to an immaterial and frivolous issue, and was in other respects informal and insufficient.

As to the *third* plea, That the said *Rankine* was not before, or at the time of the date or issuing forth of the said *fiat* in bankruptcy, indebted to the defendant in manner and form as the defendant has above in that behalf alleged. *Conclusion* to the country.

Stephen, Serjt., in support of the demurrer.—*First*, There cannot be two separate pleas of set-off to separate parts of the declaration. The Stat. Geo. 2 (*a*), which gives the plea of set-off, intends to give it as an answer to the whole action. If a plaintiff claimed 100*l.* by one count of his declaration, and 100*l.* by another count, the defendant having a set-off to the amount of 150*l.* to the whole demand, might plead that to each of the counts, and so answer a claim for 200*l.* with a set-off to the amount of 150*l.*

Secondly, The plaintiffs' claim does not come within the description of "a mutual debt or credit," to which a set-off is applicable within the Bankrupt Act (*b*). The action is brought for not accepting a bill of exchange. This is not a debt; for the bill which the defendant refused to accept would not have been due until *September*, 1834, and no action of assumpsit for the goods sold could be maintained until after that time, *Mussen v. Price* (*c*). This action was commenced in *July*, 1834, and the principle laid down in that case therefore applies to the present. *Dutton v. Solomonson* (*d*), *Brooke v. White* (*e*), *Hoskins v. Duferoy* (*f*), are to the same effect. But *Hutchinson v. Reid* (*g*) is still more to the point. There, where goods were sold, to be paid for by a bill of exchange at a given date, to an action commenced within that time, for refusing to give such bill, the defendant was not allowed to give evidence of a set-off. Lord *Ellenborough* said, "The plaintiff's demand is for unliquidated damages, to which a set-off is wholly inapplicable."

Nor can this claim be called a mutual credit. It is true, that in *Smith v. Hodson* (*h*), it was held, that where a defendant had paid an acceptance, after the bankruptcy, as surety for a bankrupt, that it was a *mutual credit* which he might set off. But in the subsequent case of *Rose v. Hart* (*i*), *Gibbs*, C. J., said, "that a mutual credit must terminate in a cross debt." This is an action for unliquidated damages. In *Glennie v. Edmonds* (*j*), it was held, that a loss on a policy could not be set off against the premium. In *Sampson v. Burton* (*k*), it was held, that a guarantee against contingent damages could not be called a mutual credit; and in *Rose v. Sims* (*l*), where an action was brought for not indorsing a bill according to agreement, it was held not to be a subject of mutual credit. Mr. J. J. *Parke*, there remarked, "This is not a case of mutual credit within the Bankrupt Act; it is merely

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(a) 2 Geo. 2, c. 22, sec. 13.
(b) 6 Geo. 4, c. 16, sec. 50.
(c) 4 East, 145.
(d) 3 Bos. & Pul. 582.
(e) 1 New Rep. 330.
(f) 9 East, 496.

(g) 3 Camp. 330.
(h) 4 T. R. 211.
(i) 8 Taunt. 499.
(j) 4 Taunt. 775.
(k) 2 Brod. & Bing. 89.
(l) 1 Barn. & Adol. 526.

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a case, where a cause of action arises for the nonperformance of a contract. The provision, with respect to mutual credits, is confined to debts between the bankrupt and other parties, or to transactions necessarily ending in debts; the cause of action here did not fall within either description."

Henderson, contra.—First, As to the objection in point of form, the plaintiffs ought to have demurred to both the pleas of set-off if they wished to raise the objection. An issue is offered upon the third plea, and by the strict rule, that plea ought not to have appeared at all upon the Demurrer Book; and the plaintiffs cannot call in aid the third plea, which they have traversed, for the purpose of supporting their objection to the second.

As to the second objection, that the claim is not a mutual debt or credit within the 50th sec. of the Bankrupt Act, the answer is, that the transactions between the bankrupt and defendant were of the ordinary description of purchase and sale. *Rose v. Sims (m)* was an action for not indorsing a bill of exchange, which need not necessarily have terminated in a debt, and the judgment of the Court was given upon the ground "that the damages were unliquidated, and their amount dependant upon circumstances; and how could the commissioners in such a case have stated an account between the parties as directed by the act?" So in *Glennie v. Edmonds (n)*, the amount could not be ascertained. *Hoskins v. Duferoy (o)* bears upon a different point. It decided, that although a claim may not be sufficient to support a petitioning creditor's debt, that it may be enforced by way of set-off. But here there could be no difficulty in ascertaining the amount of the balance due to the plaintiffs, for there was a certainty both in the event and in the amount of the debt. In *Uttersen v. Vernon (p)* it was decided, that where a creditor has a debt which is capable of being ascertained without the intervention of a jury, and the debtor becomes a bankrupt, it may be proved under the commission. The transaction between these parties clearly amounts to a case of mutual credit, and although the action is in form, for unliquidated damages, the substance of the transaction is the material point to be considered.

Stephen, Serjt., in reply, contended that the case was not distinguishable from *Rose v. Sims (q)*.

Cur. adv. vult.

TINDAL, C. J.—In this case the plaintiffs have taken two objections to the special plea of the defendant pleaded by him to the first count of the declaration, one, a formal objection assigned for cause of special demurrer; the other, an objection in point of law.

As to the formal objection, we think the plaintiffs cannot avail themselves thereof in the present state of the record. The plaintiffs have demurred specially to the first plea of set-off pleaded to the first count, and have traversed the second plea of set-off pleaded to the second count. As against the plaintiffs, therefore, who have denied the facts stated in the second plea

(m) 1 Barn. & Adol. 526.
(n) 4 Taunt. 775
(o) 9 East, 498.

(p) 3 T. R. 589.
(q) 1 Barn. & Adol. 526.

to be true, it may be taken that the facts alleged in it are not in existence; that is, as if there were no set-off in point of fact against the second count of the declaration. The plea of set-off to the first count may therefore be considered as if it stood alone, and in that case there could be no objection to a defendant's pleading a set-off to one count only of a declaration. Even if the plaintiff had traversed each plea separately, and gone to trial upon separate issues on those pleas, we cannot see that the difficulty urged by the plaintiffs could ever have taken place. For after the defendant had given evidence of the items of his set-off against the first count, he would not be allowed to give evidence of the same items a second time, as an answer to the demand in the second count. Unless, therefore, the whole set-off was large enough to cover the demands in both counts, the plaintiff must have recovered either on the one count or the other. And we think, further, that if the objection intended to be taken, was the joining on the record two separate pleas of set-off, one to each of the counts of the declaration, the demurrer should have extended to both pleas, and the misjoinder have been then alleged as the ground of demurrer; for the putting of the one plea upon the record, is as much to be objected to, as placing the other there.

With respect to the objection in matter of substance to the first plea of set-off, the question is, whether the cause of action stated in the first count of the declaration, and the debts alleged in the plea to have been due from the bankrupt to the defendant before and at the time of his bankruptcy, can be considered "as mutual *credits* between those parties;" so that "the one *debt or demand*" may be set off against the other, within the meaning of the Statute 6 Geo. 4, c. 16, s. 50.

Looking to the *form* of the first count of the declaration, it is a claim for unliquidated damages against the defendant, for not accepting a bill of exchange, according to a special agreement entered into between the defendant and the bankrupt. But that agreement appears on the face of the first count to have been in substance a contract to accept a bill in payment of the remainder of the price of certain goods sold and delivered by the bankrupt to the defendant; and the bill of exchange is expressly alleged in that count to have been drawn "for the balance then due and owing from the defendant to the said bankrupt upon the account aforesaid."

In substance therefore the bill, if accepted, would have been a security for the payment at a future day of a settled and ascertained balance due upon an account in which the price of goods sold to the defendant formed one side, and partial payment made by the defendant the other side.

It is to be observed further, that the plaintiffs, although they have brought a special action of assumpsit, have stated no special damage in their declaration, so that the measure of damage to which the jury would be confined in their verdict, is necessarily a mere matter of calculation, *viz.*, the amount for which the bill was drawn, together with the interest due upon it, if the time of payment was passed; or the amount of the bill, "*minus*" the discount, if the bill was not then due; and the question is, whether this is such a *credit* given by the bankrupt to the defendant as comes within the meaning of the clause above referred to.

The principle which the bankrupt laws seem to have had in view from the earliest time to the last provisions made therein, is this: that where two persons have dealt with each other on mutual credit, and one of them

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becomes bankrupt, the account shall be settled between them, and the balance only payable on either side.

That this was the practice of the Commissioners of Bankrupt long before any statutory provision on the subject, appears clear from the two earliest decided cases, *Anon.* 1 *Mod.* 215, before Lord C. J. *North*; and *Chapman v. Derby*, 2 *Vernon*, 117 (1689).

The first Statute which made any express provision on the subject was the expired Statute 4th and 5th *Anne*, c. 17. By that Statute it was enacted in the 11th section, that where there hath been mutual credit given between the bankrupt and any debtor, and the accounts are open and unbalanced, it shall be lawful for the commissioners or *assignees* to adjust the account, and the debtor shall not be compelled to pay more than shall appear to be due on such balance. This provision of the expired Statute of *Anne* is re-enacted in the 28th section of the 5th *Geo.* 2, c. 30, with some variation in the expression, that section enacting, "that the commissioners or assignees shall state the account between them, and *one debt may be set against another*; and what shall appear to be due on either side on the balance of such account, and on setting such *debts against one another*, and no more, shall be claimed or paid on either side respectively."

This Statute continued in force until the 46th *Geo.* 3, c. 135, s. 3, which provides that where there hath been mutual credit given, or mutual debts between the bankrupt and any other person, "one debt or demand may be set against the other, notwithstanding any secret act of bankruptcy before committed." The same language is continued in the last Statute, 6 *Geo.* 4, c. 16, s. 50.

So that from the earliest practice to the latest provision by Statute, the object seems to have been, that the account should be stated as between merchant and merchant, and that whatever would be in ordinary practice a pecuniary item in such account, should be the subject of set-off. And we think the demand of the bankrupt against the defendant, under the circumstances stated upon this record, falls clearly within this description.

The cases upon which the plaintiffs have principally relied in argument are two; the case *Ross v. Hart*, 8 *Taunton*, 499; and *Rose v. Sims*, 1 *Barn. & Adol.* 526. In the former, Lord C. J. *Gibbs*, in giving the judgment of the Court, has laid down the rule of interpretation, that by *credit* the legislature meant "such credits only as must in their nature terminate in debts," a distinction that is adopted by the Court of *King's Bench* in the latter case of *Rose v. Sims*.

Now, it is observable, that in giving judgment in the former case, the Chief Justice states the law of set-off to depend upon the enactment in the 5th *Geo.* 2, c. 30, s. 28; and lays great stress upon the circumstance, that it is enacted merely in the final words of the clause, "that one *debt* shall be set against another." But in point of fact the law of set-off at that time was governed not by the 5th *Geo.* 2, only, but also by the 46th *Geo.* 3, c. 135, s. 3; by which latter Statute it was enacted as before observed, that "*one debt or demand* may be set off against another;" and it is difficult to see for what purpose such latter word can have been introduced, and have been since continued in the 50th section of the last bankrupt act, except for the purpose of giving a greater latitude than the strict meaning of the word *debt* would of itself import.

Without, however, relying on the inference from the introduction of the word "demand," and taking the explanation of the word *credit*, with the restriction adopted by the Courts of *Common Pleas* and *King's Bench*, we think the claim of the bankrupt in this case is one which would in its nature terminate in *debt* and nothing else. If the demand had not been enforced until after the time for which the bill was to run, the demand became actually a debt for which the bankrupt might have brought his action for goods sold, or on an account stated. If enforced before the time had expired, his demand was one which must become a debt in a short time, and of which the present value was determinable by deducting the discount for the time the bill had still to run. And as to the case of *Rose v. Sims*, we think the present case may well be distinguished from it. In that case a special action was brought for not *indorsing* a bill of exchange according to an agreement. If the indorsement had been made, it would not in its nature necessarily have terminated in a *debt* from the defendants, for the acceptor would have been the debtor, the indorser a guarantee only.

Upon the whole the demand appears to us to be a mere pecuniary demand, which the commissioners or assignees might have stated in account between the defendant and the bankrupt; a demand, which, although unliquidated at the moment, was capable of being reduced to certainty by a simple calculation, where no special damage had been incurred.

This determination agrees with the principle adopted by the Judges of this Court in *Sampson v. Burton*, 2 *Brod. & Bingham*, 94; and is not in conflict with the two cases on which the plaintiffs have principally relied, and certainly is more consistent with the principle and spirit of the bankrupt laws. For these reasons we think there ought to be judgment for the defendant.

Judgment for the defendant.

Ex parte BOWLES.

April 30th.

G. WHITE applied for a rule, that an attorney's bill should be taxed by the Prothonotary of the Court. An action had been commenced to recover the bill, and the defendants were prepared to pay all reasonable charges, but it was shewn that many of the charges were unfair and unreasonable.—[*Tindal*, C. J.—Are there any legal charges which bring the case within the Statute? (a)]—There are the following items: "Paid agents for attending at the warrant of attorney office;" "Paid for search and extract;" which are within the terms of the Statute. In *Wilson v. Gutteridge* (b), the Court ordered a bill to be taxed, where the charges were for drawing a warrant of attorney, and attending the defendant respecting it; and that upon the ground that the Court had a paramount jurisdiction to order a bill to be taxed, independently of the Statute.—[*Bosanquet*, J.—That proposition has been denied in *Clutterbuck v. Combes* (c), and other cases (d).]

1. Charges for searching the Warrant of Attorney Office, and for a fee paid there, do not make an attorney's bill taxable under Stat. 2 Geo. 2, c. 23.

2. The Court has no common law jurisdiction to order an attorney's bill to be taxed.

(a) 2 Geo. 2, c. 23, sec. 23.

(b) 3 B. & Cress. 157.

(c) 5 Barn. & Adol. 400.

(d) In *Tidd's Prac.* 327, 9th ed. it is said, "But though the statute applies only to particular cases, and to bills of a particular description, yet the Court it seems still retains, and has always exercised, a right, as

at common law, to direct the taxation of other bills of costs; and such is said to be the constant practice." In *Clutterbuck v. Combes*, 5 B. & Adol. 401, Mr. Justice *Littledale* said, that this proposition had been denied over and over again in the Court of K. B., and that the contrary was settled. See *Dagley v. Kentish*, 2 Barn. & Adol. 411.

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TINDAL, C. J.—The question is, whether a payment for going to a public office, and searching for judgments, and paying a fee there, comes within the description of “fees, charges, or disbursements,” in Stat. 2 Geo. 2, c. 23, sec. 13; and we are of opinion it does not. *Fenton v. Corne* (e). If the demand is unreasonable, the defendants must pay money into court, and defend the action.

Rule refused.

(e) 1 Ryan & Moody, 262.

May 13th.

ATKINSON v. BAYNTUN.

A defendant against whom judgment on demurrer was given, having obtained further evidence, obtained leave from a judge at chambers to make a material amendment in one of the pleas:—

Held, that the proceeding was irregular, but under the circumstances the Court refused to set aside the order.

A DEMURRER had been argued in this case, and judgment was given for the plaintiff (a). After the demurrer had been argued, and judgment given, the defendant obtained an order from a judge at chambers, for leave to amend his fourth plea, by inserting an averment, that the sum for which the second execution issued, included the sum indorsed on the first writ of execution.

Sir W. Follett having obtained a rule to set aside the order,

Talfourd, Serjt. and J. Manning shewed cause.—[Upon certain affidavits which disclosed that since judgment had been given on the demurrer, the plaintiff had delivered an account to the defendant, of the several sums of money which he had received, and that the defendant had been previously ignorant of the amount of these payments.]—In *The King v. The Archbishop of York* (b), by a judge's order, two counts were allowed to be added in *quare impedit*, and upon an application being subsequently made to the Court, Denman, C. J., said, that after an application to a judge at chambers, the Court had hardly authority to interfere; and in *Wood v. Plant* (c), Mansfield, C. J., thus expressed himself upon the subject of judges' orders: “It is true that the order is made by a judge at chambers, but still it is to be regarded the order of the Court. The effect of these orders was much considered in *The King v. Wilkes*, 4 Burr. 2570. They are as binding as any act of the Court, though they are not entered and made rules of Court, unless it be necessary to enforce them by attachment.” If this amendment is not allowed, the defendant will suffer great hardship, for the opinions given upon the demurrer, by Mr. J. Vaughan and Mr. J. Bosanquet (d), depend entirely upon the fact, that it did not appear on the pleadings that the second execution issued for the same debt as the first.

Sir W. Follett, *contrâ*.—This application ought to have been made to the Court after the demurrer was argued, and before judgment was pronounced. A new plea has been added, rather than an amendment made to the old one, and the effect of the plea, as it now stands, is to raise the same point as that which has been already discussed and decided.

(a) See the case reported, *ante*, p. 7.

(b) 1 Ado. & Ellis, 394.

(c) 1 Taunt. 44.

(d) See *ante*, p. 14.

TINDAL, C. J.—The defendant has not taken the regular and proper course in obtaining this judge's order; and the application ought to have been made at the time the demurrer was argued. The only question is, whether it does not make a difference in the case, that the knowledge of this fact came to the defendant after the judgment was given in the demurrer; and, as it seems, that if the application had been made at the time, we should have assented to it, I think we ought to allow the amendment now.

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GASELKE, J., and VAUGHAN, J., concurred.

BOSANQUET, J.—In some cases the Court will allow pleadings to be amended after a demurrer has been argued. But I disapprove very much of the course which has been adopted in this case. The parties having argued the case, and heard the decision of the Court, do not apply to the Court where all the facts of the case are known, but go to a judge at chambers, who was not sitting here when the case was argued, and obtain leave to alter one of the pleas entirely. At the same time, under all the circumstances which are stated in the affidavits, I agree that the amendment may be allowed.

Rule discharged.

Follett applied for the costs of the rule, which the Court granted, upon the ground that if the defendant had applied to the Court for leave to amend, it would only have been assented to upon payment of costs.

BOULTON v. COGHLAN.

May 1st.

ASSUMPSIT on a promissory note, dated 12th *September*, 1833, for 100*l.*, made by defendant, payable to the order of one *V. Knight*, six months after date, and indorsed by *Knight* to the plaintiff. *Pleas*.—*First*, That before the making of the said promissory note by defendant, to wit, on the 23d day of *July*, 1833, and on divers other days afterwards, the defendant did on each of those days, at one time, lose to one *John Aldridge*, and the said *John Aldridge* did on each of those days, at one time, win of the defendant, a certain sum of money, amounting in the whole to the sum of 100*l.*, by gaming, and playing at a certain game called *French Hazard*, contrary to the Statute in that case made and provided, and the said sum so won and lost being and remaining due and unpaid (to wit) on the 12th day of *December*, 1833, it was agreed between the defendant and the said *John Aldridge*, that the payment thereof should be secured by the promissory note of the defendant, to be by him made, and whereby he should promise to pay 100*l.* to the order of the said *V. Knight*, as for value received, six months after the date thereof; and defendant averred, that in pursuance of the said agreement, the defendant made the said promissory note, and thereby promised to pay 100*l.* to the order of the said *V. Knight*, as for value received, six months after the date thereof, for securing the payment by the defendant, of the said sum so won and lost as aforesaid; and defendant averred that the said promissory note, so made as aforesaid, was the same identical promissory note in the declaration mentioned, whereby and by force of the Statute in such case made and

Defendant pleaded to an action brought on a promissory note, that a certain agreement was made between him and one *A.* for the settlement of gambling debts, and that the note was given for securing the payment of such balance, and was consequently void under the statute. The proof was that the note was substituted for a bill of exchange, which was originally given to secure the balance of the gambling debts:—*Held*, that the plea was not supported by the

evidence, and that the substituted as well as the original agreement, should have been stated in the plea.

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provided, the said promissory note was and was void. Conclusion with a *verification*. *Second plea*, That there was no consideration for the said defendant making the said promissory note, and that *V. Knight* indorsed the note to the plaintiff without any consideration for so doing, and that the plaintiff held the same without any consideration for his being the holder thereof.

Replication to first plea, That the said promissory note was not made by defendant in pursuance of the said agreement in the said first plea mentioned, for securing the payment by the defendant of the said sum in that plea mentioned to have been won and lost, as in that plea mentioned. To the *second plea*, that the said indorsement by the said *V. Knight* to the plaintiff, was made before the said promissory note became due, to wit, &c., and that the said *V. Knight*, then being the holder of the said promissory note, delivered it to the plaintiff with the said indorsement thereon, for a good consideration, that is to say, for and in respect of the said *V. Knight* being then indebted to the plaintiff 200*l.* for the work and labour of the plaintiff, by him performed as an attorney, &c.

It was in evidence at the trial, before *Gaseles, J.*, at the *London Sittings*, that there had been gambling transactions between *Aldridge* and the defendant, and in *July, 1833*, they balanced their gambling accounts, when the defendant gave *Aldridge* a bill of exchange for the balance, payable six months after date. *Aldridge* indorsed that bill to *Knight*, and before it became due, *Knight* and the defendant agreed, at *Aldridge's* suggestion, to cancel it, and to substitute for it the note stated in the declaration. This agreement was carried into effect, and *Knight* subsequently indorsed the second note to the plaintiff.

Upon these facts it was objected at the trial for the plaintiff, that the plea was not proved, as it appeared that the note upon which defendant was sued was substituted for a former bill of exchange, and that it was the first bill which was given in payment of the gambling debt.

The jury found that the plaintiff gave good consideration for the note: that it arose out of a gambling transaction, but that the plaintiff was ignorant of that fact. *Verdict* for defendant, with leave reserved to move to set it aside and enter a verdict for the plaintiff, upon the ground above stated, and upon another point which was not decided.

Steer having obtained a rule *nisi* accordingly,

Talfourd, Serjt., and *Chandless*, shewed cause.—The replication does not deny that the agreement, stated in the plea, was made; the bill which was originally given did not amount to a payment of the balance, for it had six months to run, and by the concurrence of all parties the promissory note was substituted before that bill became due. It is therefore, as if *Aldridge* and the defendant had gone over their accounts again, and then the note had been given for the balance. It is essentially one and the same bargain, and it is admitted that the foundation of the consideration for which the note was given, was a gambling debt. The allegation in the plea is, therefore, substantially proved.

TINDAL, C. J.—The plea states that certain gambling debts having been

due to *Aldridge* in *July*, 1833, it was agreed between the defendant and *Aldridge*, that the payment of the balance should be secured by the promissory note of the defendant, payable to the order of *Knight*, six months after date, and that the note stated in the declaration is the identical promissory note so agreed to be given. The replication states that the promissory note was not made by the defendant in pursuance of the agreement mentioned in the plea. That involves a denial, both of the making of the note, and of its being made in pursuance of the agreement. It appears by the evidence, that the security given by the defendant to *Aldridge*, upon balancing the account of losses at play, was a bill of exchange, drawn before the promissory note was made, and having a different six months to run: and that before that bill was due the parties came together, and the note was substituted for the bill. It appears to me, therefore, that the agreement to give a promissory note, was not the agreement originally made, but a new and substituted agreement. Cases might be put where parties would be taken by surprise if evidence of an agreement, different from that stated in the pleadings, were admitted; and a party might be admitted to prove a series of substitutions, if admitted to prove this. The agreement on the plea is not the agreement proved, and the defendant should have pleaded the substituted, as well as the original agreement; that not having been done, I think the plaintiff is entitled to recover.

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The other judges concurred.

Rule absolute.

The defendant's counsel then applied for leave to amend the plea, and go to a new trial upon payment of costs, but the Court refused to grant the application.

Spankie, Serjt., and *Steer*, were to have argued in support of the rule.

ALEXANDER and an' v. GARDNER and an'

May 6th.

ASSUMPSIT for goods bargained and sold. *Plea*.—*Non assumpsit*. At the trial before *Tindal*, C. J., the following facts were in evidence:—

On the 11th of *Oct*. 1833, the plaintiffs, who were merchants in *London*, and agents for *Irish* houses for the sale of butters, made the following contract through the intervention of their broker:—

"*London*, *Oct*. 11, 1833.

"Sold to Messrs. *William Gardner* and Son, for account of Messrs. *Alexander* and Co. 200 firkins *Murphy* and Co.'s *Sligo* butter, at 71s. 6d. per cwt., free on board, for first quality; 4s. and 6s. difference for inferiors. Payment, bill at two months from the date of landing. To be shipped this month. An average for weights and tares, within six days of landing, if required."

On the 6th of *November* the butters were shipped, and on the 11th of the same month, the plaintiffs received an invoice of the goods, containing an account of the weight and number of casks, and also the bill of lading,

The plaintiffs in *London* entered into the following contract with the defendants. "Oct. 11, 1833. Sold to *Gardner* and Son, for account of Messrs. *A. and Co.*, 200 firkins of *Murphy* and Co.'s *Sligo* butter, at 71s. 6d. per cwt. free on board. Payment, bill at two months from the date of landing. To be shipped this month," &c.—The butters were not shipped

until the following month, but the jury found that the defendants had waived that condition, and they accepted the invoice and the bill of lading, which was indorsed to them. The butters were afterwards lost on the voyage:—*Held*, that an action for goods bargained and sold was maintainable to recover the price of the butters.

Held also, that the landing of the goods was not a condition precedent to the claim of payment.

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which described the casks by marks, and the different quantities. It was also stated to the plaintiffs, that the butters would have been shipped before, but that no vessel bound for *London* had been in the port of *Sligo*. The day after receiving this information, the plaintiffs communicated it to the defendants, and, according to the custom of the trade, handed over the invoice and bill of lading to them, having first struck out their own names at the top of those documents, and substituted the defendants' names.

A day or two after the defendants had received the invoice and bill of lading, they raised an objection as to the time of the shipment of the butters, and complained that by the contract the goods ought to have been shipped in *October*; but they subsequently abandoned the objection, and agreed to receive the goods.

In *December*, 1833, the vessel in which the goods were shipped was wrecked on the *Irish* coast, and the butters were in part entirely lost, and the remainder much damaged. One hundred and seventy-two firkins of the damaged butters were forwarded to *England*, and tendered to the defendants; but in consequence of the accident, they refused to receive the damaged butters, or to pay for the 200 firkins which had been shipped. This action was brought to recover 414*l.* the value of the butters according to the terms of the contract. *Verdict* for the plaintiffs for 414*l.*; and the jury found that the objection as to the time of shipment had been waived by the defendants.

Talfourd, Serjt., obtained a rule *nisi* for leave to enter a nonsuit, upon an objection which was taken at the trial, *viz.* that under the circumstances of the case the action for goods bargained and sold could not be sustained; that the contract was special, and ought to have been declared upon specially.

Bompas, Serjt., and *Martin*, shewed cause.—The action for goods bargained and sold is maintainable, and to establish this, two propositions must be established: *First*, That at the time the action was brought there had been a bargain and sale of the butters, which are the subject matter of it, by the plaintiffs to the defendants; and *Secondly*, That at the same time the defendants were indebted to the plaintiffs for them; *viz.* that the price was ascertained, and the period of credit elapsed.

If these two propositions are established, then it is shewn that the defendants were indebted to the plaintiffs for goods bargained and sold, which is the position alleged in the declaration.

First, These butters were bargained and sold. The expression, bargain and sale, is defined in *Shep. Touchstone* (a) to signify "the transferring of the property in a thing from one to another, upon a valuable consideration;" and here the property passed to the defendants on the 12th of *Nov.*, when they assented to take the goods, and received into their possession, as vendees, the bill of lading and invoice.

The question whether property in goods has passed from the vendor to the vendee, has frequently been the subject of discussion in the courts, and is now finally settled. The cases of *Hanson v. Meyer* (b), *Rugg v. Minott* (c)

(a) *Shep. Touch.* 321.
(b) 6 East, 614.

(c) 11 East, 310.

Shepley v. Davis (d), and *Bush v. Davis (e)*, give the rule, that when, upon a sale of goods, every thing has been done by the sellers which was to have been done by them, such as weighing, &c. the property passes; and in cases where the sale was not of goods identified and specified at the time of sale, then when the buyer has assented to the goods appropriated by the seller, the property passes, and the goods are at the risk of the buyer.

The stipulation that the goods were to be shipped in *October*, does not affect the question as to whether the property passed. It originally gave the defendants the right to insist that the butters should be shipped in that month, and to refuse to have any thing to do with them if shipped afterwards. But the jury having found that the defendants waived any objection in consequence of the butter being shipped afterwards, the case stands as if there was no such stipulation, and the shipment in *November* must be considered as a shipment under the contract.

So also the stipulation as to the average for weights and tares is out of the question. That stipulation is nothing more than giving a right to the defendants, within six days after landing, to have the weights and tares, as contained in the invoice, verified under their own inspection; and as they have admitted that the butters were of the weights mentioned in the invoice, this stipulation is also waived.

It will be said on the other side, that to constitute a bargain and sale there is a further requisite than the passing of the property, *viz.* that the goods must be specifically in existence and ascertained at the time of the making of the contract; and the case of *Simmons v. Swift (f)* will be cited as an authority for this position; but in that case something still remained undone by the vendor; and other cases establish the contrary doctrine, *Rhode v. Thwaites (g)*, *Atkinson v. Bell (h)*, *Elliott v. Tyler (i)*. The decisions in the two cases of *Rhode v. Thwaites*, and *Elliott v. Tyler*, are quite inconsistent with the position which will be contended, for in both these cases the goods were not specified and ascertained at the time of making the contract, and the action for goods bargained and sold was held to be maintainable, and the doctrine in these cases is quite consistent with the old law upon the subject, as laid down in *Comyn's Digest (j)*, where agreements are divided into executed and executory; and an agreement executed is said often to amount to a bargain and sale.

Secondly, Were the defendants indebted to the plaintiffs at the time of the action being brought? As to 172 firkins there can be no doubt, for they were landed more than two months before the action was brought, and unless it can be successfully contended that the true meaning of the bargain was that if a single firkin of the butter was damaged and thrown overboard during the voyage, the defendants were to pay nothing for the remaining 199, they are now bound to pay for the 172. But *Fragano v. Long (k)* shew that the defendants are bound to pay for the entire quantity, and that case is quite in point with the present.

When payment is to be made by a bill, and the time which the bill was to run has expired, *indebitatus assumpsit* is maintainable, *Brooke v. White (l)*.

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(d) 5 Taunt. 617.

(e) 5 Taunt. 622.

(f) 5 B. & C. 857.

(g) 6 B. & C. 388.

(h) 8 B. & C. 277.

(i) 10 Bing. 512.

(j) Tit. "Agreement," A. 1 & 2,

(k) 4 B. & C. 219

(l) 1 T. R. 330.

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In *Gordon v. Martin* (m) it was held, that an *indebitatus assumpsit* will not lie upon a special agreement till the terms of it are performed, but when that is done it raises a duty for which a general *indebitatus assumpsit* will lie. In *Alcorns v. Westbrook* (n) Mr. J. Denison says, "If a man agrees to build for another a house, to be paid for it, and afterwards builds the house, in this case he has two ways of declaring, either upon the original executory agreement to be performed in future, or upon an *indebitatus assumpsit* when the house is actually built and the agreement executed." There is no distinction between a case where goods are to be delivered generally, and goods to be delivered within a certain time. The rule as to when a contract should be declared upon specially, is given in Serjt. *Williams'* note to *Osborne v. Rogers* (o). "The *indebitatus* counts may be resorted to in all cases where the contract is executed, and nothing remains to be done but the payment of money." The same rule is also given in somewhat different words in *Buller's Nisi Prius* (p), "An *indebitatus assumpsit* will not lie upon a special agreement until the terms of it are performed; yet when that is done, it raises a duty for which a general *indebitatus assumpsit* will lie." Then it is said that the property in the goods never passed to the defendants; but by the transfer of the invoice and bill of lading, which are the symbols of possession, the property passed, *Lickbarrow v. Mason* (q), *Haille v. Smith* (r), *Cuming v. Brown* (s), *Barrow v. Coles* (t). Nor had the plaintiffs any insurable interest remaining in the goods, *Hibbert v. Carter* (u).

Talfourd, Serjt., and *Kelly*, *contra*.—There are several objections to the plaintiffs' right to recover in the present form of action. The butters were not in the possession of the vendors at the time the contract was entered into, and they might not even have been in existence. The contract which was entered into was special in its terms, and the plaintiffs were bound to put it in evidence. *Fragano v. Long* (v) is distinguishable from the present case, for there the plaintiff ordered an insurance to be effected on the goods, and they were dispatched upon his risk, and that was an action by the purchaser of the goods against the ship-owner for negligence. In *Simmons v. Swift* (w) the rule is laid down; where the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified, and a part was afterwards weighed and delivered to him; it was held, that the property in the residue did not vest in the purchaser until it had been weighed, that being necessary in order to ascertain the amount to be paid; and that, even if it had vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered. Here the contract was special as to the time of delivery and the time of payment, and it was made upon a condition precedent, which ought to have been averred. If the plaintiffs had pleaded specially, they must have averred that the goods were shipped in due time, or they must have shewn a dispensation of the conditions, and the defendants could then have traversed that part of the declaration. The condition as to the shipment

(m) Fitzgibbon, 303.

(n) 1 Wilson, 117.

(o) 1 Saunders, 269, b note 1.

(p) Bull. N. P. 139.

(q) 2 T. R. 63.

(r) 1 B. & P. 563.

(s) 9 East, 506.

(t) 3 Camp. 92.

(u) 1 T. R. 745.

(v) 4 B. & Cress. 219.

(w) 5 B. & Cress. 857.

of the goods was a condition precedent; and that condition being in writing, it could not be waived by parol, *Goss v. Lord Nugent* (x).—[*Tindal, C. J.*—That point was not made at the trial, and we cannot entertain it now. The plaintiffs might have offered other evidence if the objection had then been raised.]—Another objection arises upon the mode of payment stipulated for by the contract, which is by bill at three months from the date of landing. Now, as the goods did not reach their destination, the day of payment did not in strictness arrive.

TINDAL, C. J.—The question in this case is, whether an action for goods bargained and sold can be maintained. The defendants contend that such an action does not lie against them, but that the plaintiffs were bound to declare specially. The original contract was made on the 11th of *October*, 1833, in which it was stated that the plaintiffs sold to the defendants 200 firkins of *Murphy and Co.'s Sligo* butter, free on board, at 71s. 6d. per cwt., the payment to be by bill at two months from the date of landing, and to be shipped that month. Upon this contract three points have been raised by the defendants to this action for goods bargained and sold. *First*, That the butters were not in the possession of the plaintiffs at the time of the contract. *Secondly*, That they were not shipped in *October* in pursuance of the contract; and *Thirdly*, That they were to be paid for by bill at two months from the date of landing, but as the goods were never landed, the defendants were never liable to pay. But, notwithstanding these objections, I think circumstances have passed in this transaction which entitle the plaintiffs to maintain this action for goods bargained and sold. I agree that the plaintiffs must shew that the property in the goods has passed to the defendants by the contract, or they cannot be said to be bargained and sold.

As to the first point, I do not find that any case goes so far as to hold that if the goods were ascertained and accepted before the action was brought, that it is any objection that they were not in the possession of the plaintiffs at the time of the contract. In *Rhode v. Thwaites* (y), the vendor having in his warehouse a quantity of sugar in bulk, agreed to sell twenty hogsheads; four hogsheads were delivered, and the vendor filled up and appropriated to the vendee sixteen other hogsheads; and informed him that they were ready, and desired him to take them away; the vendee said he would take them as soon as he could; and it was held, that the appropriation having been made by the vendor and assented to by the vendee, the sixteen hogsheads thereby passed to the latter, and that their value might be recovered by the vendor under a count for goods bargained and sold. In the present case it cannot be said that the goods were not ascertained and accepted before the action was brought; for the invoice containing the description and price of the butters was accepted by the defendants, and the bill of lading was also regularly indorsed and accepted by them. But then it is said that the goods ought to have been shipped in *October*, and that it was a condition precedent to any claim on the defendants; and if the defendants had in the first instance repudiated the purchase on that ground, they could not have been sued in any form of action. But it is in evidence,

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(x) 5 B. & Adol. 58.

(y) 6 B. & Cress. 388.

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and found by the jury, that the defendants waived that objection, and after that, it must be taken that the waiver was legally made. The last objection arises on the meaning of the words in the contract relating to the time of payment, which is stated to be by bill at two months from the date of landing. But the object of that stipulation was to point out the time of payment, and not to make the landing of the goods a condition precedent. Upon that point it is only necessary to refer to the case of *Fragano v. Long* (z).

Upon the whole, this case is brought within the proposition contained in the note to 1 *Williams, Saund.* 269 (b), "that the general counts may be resorted to in all cases where the contract is executed, and nothing remains to be done but the payment of the money." And then the other side of the proposition is stated, "But where the special contract remains unperformed, even by the fault of the defendant, the declaration must still be special; therefore, where goods are sold, to be paid for by a bill, and the purchaser refuses to give the bill, the declaration must be special, unless the plaintiff wait till the bill would have become due if it had been given." In the present case, the action was not brought till the two months after the date of the landing would have expired, if the goods had arrived in the ordinary course. The plaintiffs, therefore, are in the situation of those who have parted with their goods; and the defendants having received them upon an engagement to pay, the action for goods bargained and sold will lie, and this rule must be discharged.

PARK, J.—A great portion of the argument has gone upon the consideration of the original contract as to shipping the goods in *October*; but that having been waived, it need not be discussed. The question is, whether the action for goods bargained and sold can be maintained, and that depends upon this, whether there has been an acceptance of the goods by the defendants; and I think there has been, by their receiving the invoice and bill of lading. The cases cited for the defendants amount to this, that when goods are sold they remain at the risk of the vendor until he has done every thing to complete the contract. As where goods were to be weighed, or where there had been no specific appropriation. But the present case falls within the principle of *Rhode v. Thwaites* (a), and *Fragano v. Long* (s). We have been pressed with the case of *Simmonds v. Swift* (b), but that case is totally different. There the goods were sold at a certain price per ton, and until the weight was taken no property passed. In *Rhode v. Thwaites* (a) all that was required was done by the vendor; he had a quantity of sugar in bulk, and agreed to sell twenty hogsheads; he had only four hogsheads filled, which he delivered to the vendee; but he filled up and appropriated the remaining sixteen hogsheads, and informed the vendee that they were ready; and it was held, that the appropriation having been made and assented to, that it amounted to an actual delivery. The argument that the landing of the goods was a condition precedent is answered by the case of *Fragano v. Long* (z), and I cannot distinguish that case from the present. There the plaintiff was at *Naples*, and the time of credit allowed was three months from the time of arrival; and it was held, that the property in the goods

(z) 4 B. & Cress 219.

(a) 6 B. & Cress. 388.

(b) 5 B. & Cress. 857.

vested in the plaintiff before their arrival at *Naples*. The two cases, therefore, which I have last mentioned fully warrant our present decision.

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BOSANQUET, J.—I think that this amounts to a contract-executed, upon which a declaration for goods bargained and sold may be maintained. It is not necessary, to support such an action, that the goods should be actually in the possession of the vendor. It is sufficient if he is entitled to the possession, and has done all that was required on his part to effectuate the contract. The second objection is, that the plaintiffs ought to have declared specially upon the contract, and that a performance of the condition precedent should be averred, or a waiver of it be shewn. But this is not a contract by deed, but was a parol contract, containing a condition precedent, which was afterwards waived. A contract must be declared upon according to its legal effect, and here the effect of all the circumstances is to make it a contract without a condition. It is said, that the arrival of the goods is a condition precedent to payment, and that the time of payment has never arrived; but that objection is answered by the case of *Fragano v. Long* (c).

Rule discharged.

(c) 4 B. & Cress. 219.

CURTIS and or^s v. SPITTY.

DEBT, by the executors of lessor, against the assignee of lessee, to recover arrears of rent. The declaration set out a lease, dated 24th April, 1800, made by the plaintiffs' testator to one *W. Coppin*, for ninety-nine years (subject as therein mentioned), containing a covenant by lessee and his assigns, to pay a certain yearly rent; and the plaintiffs averred, that "on the 1st of January, 1816, all the estate, right, title, interest, term of years then to come and unexpired, property, profit, claim, and demand whatsoever of him the said *W. Coppin*, of, in, and to the said demised land and premises, with the appurtenances, by assignment thereof then and there made, legally came to and vested in the said defendant." The defendant pleaded (with other pleas which are not material), that all the estate, &c., did not come to him in manner and form alleged, traversing the averment in the words of the declaration. Upon this plea the plaintiffs joined issue. At the trial before *Littledale, J.*, it was in evidence, that in 1813 the premises comprised in the lease, were divided into three parcels, and sold by the executor of *Coppin* in three separate lots, and that the defendant's father purchased one of the parcels, which was duly assigned to him, for all the residue of the lessee's interest in the term, and that the defendant was the personal representative of his father. The action was brought to recover arrears of rent accruing due after the assignment.

A verdict was taken for the plaintiff by consent, with leave reserved to

action in debt against the assignee of part of the land demised, to recover rent whole of it.

1. In debt for rent on a lease, by lessor against the assignee of the lessee, the declaration stated that all the estate, &c. of the lessee came to and vested in the defendant, which allegation the defendant traversed, and the plaintiffs joined issue. It was in evidence that defendant was assignee of only a part of the demised premises. *Held*, that there was a fatal variance, and that the issue must be found for the defendant.
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CURTIS and or^r v. SPITTY.

DEBT, by the executors of lessor, against the assignee of lessee, to recover arrears of rent. The declaration set out a lease, dated 24th April, 1800, made by the plaintiffs' testator to one *W. Coppin*, for ninety-nine years (subject as therein mentioned), containing a covenant by lessee and his assigns, to pay a certain yearly rent; and the plaintiffs averred, that "on the 1st of January, 1816, all the estate, right, title, interest, term of years then to come and unexpired, property, profit, claim, and demand whatsoever of him the said *W. Coppin*, of, in, and to the said demised land and premises, with the appurtenances, by assignment thereof then and there made, legally came to and vested in the said defendant." The defendant pleaded (with other pleas which are not material), that all the estate, &c., did not come to him in manner and form alleged, traversing the averment in the words of the declaration. Upon this plea the plaintiffs joined issue. At the trial before *Littledate, J.*, it was in evidence, that in 1813 the premises comprised in the lease, were divided into three parcels, and sold by the executor of *Coppin* in three separate lots, and that the defendant's father purchased one of the parcels, which was duly assigned to him, for all the residue of the lessee's interest in the term, and that the defendant was the personal representative of his father. The action was brought to recover arrears of rent accruing due after the assignment.

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action in debt against the assignee of part of the land demised, to recover rent whole of it.

1. In debt for rent on a lease, by lessor against the assignee of the lessee, the declaration stated that all the estate, &c. of the lessee came to and vested in the defendant, which allegation the defendant traversed, and the plaintiffs joined issue. It was in evidence that defendant was assignee of only a part of the demised premises. *Held*, that there was a fatal variance, and that the issue must be found for the defendant.

2. *Semble*, That it is a nice and difficult question whether a lessor can maintain an action for rent issuing from the

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apply to the Court to enter the verdict for the defendant, upon the issue raised by the said plea.

Thesiger obtained a rule *nisi* accordingly. He cited *Hare v. Cator* (a), in which it was held that where a declaration against the defendant charged him as assignee of *all* the estate in certain premises, it was held a fatal variance, because it appeared in evidence that he was only assignee of a part of the estate.

Wilde, Serjt., and *Petersdorff*, shewed cause (b).—*Hare v. Cator* (a) is a case of very questionable authority. It is evident that there is some mistake in the report; for it appears that the defendant purchased the fee of the premises, and the lease was never assigned. In *Merceron v. Dowson* (c), where, in covenant against an assignee of a lease, the plaintiff declared that all the right, &c., of the lessee vested in the defendant by assignment, and that afterwards the premises were out of repair; and the defendant pleaded in bar, that for one period he was possessed of one-sixth of the premises as tenant in common with A., B., and C., and for another period of one-third, as tenant in common with B. and C., and that no more or greater interest in the premises ever came to him by assignment; it was held, that the plea was bad in substance, as it could not be a bar to the whole action; and *Littledale, J.*, said, "The ground of defence set forth in the plea is, that the whole of the premises did not come to the defendant by assignment. If that were held good as a bar, the decision would amount to this, that if a lessee make assignments to various persons, as tenants in common, the landlord can never sue until he discover them all;" and it is further said in that case, that either debt or covenant will lie for rent against the assignee of a part of an estate; and *Garnon v. Vernon* (d) is cited. In *Stevenson v. Lambard* (e) it was also held, that covenant lies against the assignee of lessee for a part of the rent. Here the plaintiffs could not know the assignees of the various portions of the estate; and the defendants ought to have pleaded in abatement the nonjoinder of the other assignees, as was said by *Bayley, J.*, in *Merceron v. Dowson* (f). *Com. Digest*, tit. "Abatement," F. 12, is to the same effect. *Duppa v. Mayo* (g) establishes that debt for the arrears of a rent-charge ought to be brought against all the purnors of the profits of the lands liable, and that if it be not, the defendant can only take advantage of it by a plea in abatement; and in *Mitchell v. Tarbutt* (h), Lord *Kenyon* says, "Where there is any dispute about the title to land, all the parties must be brought before the Court."

Thesiger and *Steer*, *contra*.—The authority of *Hare v. Cator* (a) has never been impeached, and there is no ambiguity in the statement of the

(a) Cowp. 766.

(b) In Hilary Term.

(c) 5 B. & Cress. 479.

(d) 2 Levins, 231; this case is also reported 2 Sir T. Jones, 104, and recognized 2 D'Anvers, Abr. tit. "Debt," (C) 10, as follows:—"If lessee for years assigns his whole term in the moiety of the land, the lessor may have an action against the assignee for the moiety of the rent, for the

assignee having the entire estate in the moiety of the land, he hath a sufficient privity of estate to be charged by the lessor, if he pleases, with the moiety of the rent."

(e) 2 East, 574.

(f) 5 B. & Cress. 483.

(g) 1 Wms. Saund. 282, and note (4), 284.

(h) 5 T. R. 651.

judgment of the Court. The defendant has no interest in the other portions of the land, nor is he tenant in common with the other assignees as in *Merceron v. Dowson* (i); and even if he was, Mr. J. *Littledale* says, in that case, "There may be a difficulty in saying that the defendant should have pleaded in abatement, for he might not know the tenants in common with him." The lessor had his remedy by distress to recover the whole rent; but if he elects to bring an action in debt, he is bound to ascertain beforehand the extent of the defendant's liability, *Congham v. King* (j), *Garnon v. Vernon* (k), *Twynam v. Pickard* (l). But here the defendant traverses the averment in the declaration, that all the estate came to him, and the question is confined to the issue which the plaintiff has himself raised. *Stephenson v. Lambard* (m) establishes that there may be an apportionment of the rent; and the point in *Duppa v. Mayo* (n) arose on a rent charge, which cannot be apportioned.

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Cur. adv. vult.

TINDAL, C. J.—This case is brought before us upon a motion on the part of the defendant, by leave of the learned judge who tried the cause, to enter a verdict for him upon the issue raised by the second plea which is pleaded to the first count of the declaration. May 12th.

The first count of the declaration states a demise by the plaintiff's testator to one *William Copping*, for ninety-nine years, if certain persons should so long live (some of whom are still in life), at the yearly rent of 18s.; and that on "the first of *January*, 1816, all the estate, right, title, and interest of the lessee of, in, and to the said demised land and premises, with the appurtenances, by assignment thereof then and there made, came to and vested in the defendant; and that a certain sum became due to the lessor for rent of the premises after the assignment." The second plea to this first count traverses the averment, that all the estate, &c., came to and vested in the defendant in the very words of the declaration, and the issue was joined upon that traverse.

At the trial it appeared in evidence, that in 1813 the premises comprised in the lease were divided into three separate parcels, and put up to sale in three lots, by the executor of *Copping* the lessee, and that the father of the defendant purchased one of the parcels, which was duly assigned to him for all the residue of the lessee's interest in the term; which interest in such parcel is now vested in the defendant as his father's personal representative.

And whether upon this evidence the defendant is entitled to have the verdict for him, upon the issue raised by the second plea, is the only question before us.

That the issue has been found for the defendant in the precise terms in which it is raised there can be no doubt; and if so, we feel difficulty in seeing upon what principle we can look further into the question intended to be raised between the parties, in this stage of the proceedings; more particularly as the case of *Hare v. Cator* (o) is a direct authority upon the very point, that if the plaintiff alleges in his declaration that the whole interest of

(i) 5 B. & Cress. 479.

(j) Cro. Car. 221.

(k) 2 Lev. 231.

(l) 2 B. & Ald. 105.

(m) 2 East, 575.

(n) 1 Wms. Saund 282.

(o) Cowp. 766.

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the lessee came to him by assignment, and the defendant traverses the allegation, it is a fatal variance, if it appears in the evidence that the defendant was assignee of parcel only of the land originally demised. It must be admitted that the observations made in the course of the argument upon that case have excited some doubt as to the accuracy of the report. But the argument of the counsel, and the judgment of the Court, preclude the possibility of doubt, that the proposition with which the Court meant to deal was this, that even if the defendant was assignee, he could be assignee of parcel of the land only, and that the plaintiff having alleged in his declaration that he was assignee of the whole, was out of Court. And as that case has been regarded as law in *Westminster Hall*, from the time of its decision down to the present day, we do not think ourselves authorized to overrule it, where the party who is to be affected by our determination has no opportunity of reviewing our decision.

The proposition contended for by the plaintiff is this; that the lessor may charge the assignee of part of the land, in an *action of debt*, with the rent of the whole of the land comprised in the original demise. He may undoubtedly, after an assignment of part, *distrain* upon that part for the rent which accrues due for the whole; because the rent for the whole becomes due out of each and every part of the land. But in that case it must be remembered, that the avowry would be for rent due from the original tenant, and nothing would appear upon the record as to the assignment. The remedy by *distress* does not therefore afford any authority for the remedy by a direct *action of debt against the assignee*; which action, depending as it does upon the privity of contract being transferred to the assignee by reason of the privity of estate, that is, by reason of the plaintiff being the landlord, and the defendant the tenant of the same land, opens a very nice and difficult question, not settled by any decision in the books so far as we can ascertain, namely, whether there exists a privity of estate in respect of the whole land by an assignment of part only.

If the proposition of the plaintiff be the law, then the lessor would have had a good cause of action if he had stated his title in the declaration according to the fact, and had rested his demand for the whole rent upon the assignment to the defendant of part only of the demised premises, and the question might then be raised upon the record by demurrer, or the plaintiff might, by a special demurrer to the plea, have raised the same question. But he has thought proper to go to trial upon the issue tendered to him by the defendant. Under these circumstances, we think we are not justified in saying more on the present occasion than that we think the issue has been found against the plaintiff, and therefore the verdict is to be found for the defendant. If another action is brought, either party may put the question on the record.

Rule absolute.

DENNETT v. PASS and an^r

Com. Pleas.

May 1st.

AN attachment had issued to enforce payment of certain costs payable by an order of Court, "to the defendant or his attorney." *Wagstaffe* was the country attorney, but the name of his agent in *London* appeared on the record in the cause as the defendant's attorney. The demand of the costs, upon which the attachment issued, was made by *Wagstaffe*.

Atcherley, Serjt. obtained a rule *nisi*, to set aside the attachment, because the demand was not made by the attorney for the defendant, whose name appeared on the record.

Taddy, Serjt. shewed cause.—It is not denied that *Wagstaffe* is the defendant's attorney in the country, and in common parlance the country attorney is the attorney for the party, although the agent's name appears upon the record.

Atcherley, Serjt. *contrd.*—In *Hartley v. Barlow* (a), it was held that a demand made by the plaintiff's clerk was not sufficient to ground an attachment, and great particularity has always been required by the Courts in requiring the demand to be made by persons having sufficient authority. It is sometimes the practice to insert the name of the agent in the rule; the test by which to try the present case is, to ask whether *Wagstaffe* is the defendant's attorney in the suit? Now the name of another person appears on the record as being his attorney.

TINDAL, C. J.—It appears to me that the attorney in the country comes within the description of the defendant's attorney. The rule is usually drawn to make the costs payable "to the party, his attorney, or agent;" and if that was the case now, no one could doubt that *Wagstaffe* would answer the description of attorney to the defendant. The case of *Hartley v. Barlow* is distinguishable. The clerk may be changed at any time, and he may not be known to the party, but the attorney in a suit cannot be changed without an order of Court.

PARK, J.—I agree with the decision in *Hartley v. Barlow*, but this case differs entirely; when you speak of agent and attorney, every one knows that by the attorney, the attorney in the country is meant.

CASELER, J.—The plaintiff does not venture to deny that he did not know that *Wagstaffe* was the defendant's attorney.

BOSANQUET, J.—The attorney in the country is substantially the attorney in the cause.

Rule discharged.

A rule of court made certain costs in a cause payable to the defendants or their attorney. The name of the *London* agent to the country attorney was upon the record as defendant's attorney; the demand of the money was made by the country attorney:—*Held*, to be sufficient to ground an attachment, as he was substantially the attorney in the cause.

*Com. Pleas.**May 2d.*

1. An attorney's clerk corrected the date of the jurat of an affidavit after it had been sworn, and the Court set aside the proceedings to which it referred.

2. The word "peremptory" was put upon a summons to attend at chambers without the authority of the judge, and the Court inflicted the payment of costs upon the attorney.

FINNERTY v. SMITH.

A RULE had been granted to set aside a judge's order which had been obtained for better particulars of set-off, upon the ground that the plaintiff's attorney's clerk had without authority altered the date of the jurat of the affidavit, on which the judge's order had been obtained. The jurat as it was originally drawn up was incorrect in the date, and the alteration which was made after it was sworn, shewed the correct date.

A rule had also been obtained to set aside a judgment of *non pros.* for irregularity, and it appeared that the plaintiff's attorney's clerk had without authority inserted the word "peremptory" in the copy of a summons which had been obtained by the plaintiff for an attendance at chambers upon the subject of the *non pros.*

TINDAL, C. J.—The rule to set aside the judge's order must be made absolute, upon the ground that the jurat was altered by the clerk without any authority for doing so. It does not appear that the alteration was made with any fraudulent intention, but it is absolutely necessary, now that so much business is transacted at chambers, to enforce regularity in the practice. The second rule comes before us under somewhat different circumstances, and it appears that the addition of the word peremptory upon the summons, was made by the clerk without the knowledge of the plaintiff's attorneys. We do not therefore think that the plaintiff ought to suffer by the misconduct of the clerk, but as the judgment is irregular, it must be set aside upon the terms, that the plaintiff's attorneys pay the costs of this application.

PARK, J.—With the explanations which appear upon the affidavits, it is right to suppose that no fraud was intended in making the alterations, but I agree that we must not allow these irregularities to occur. The word peremptory is never inserted in a summons unless a special application is first made to the judge.

GASELER, J.—As to the alteration in the jurat, it was the duty of the attorney's clerk when he discovered the mistake to have the affidavit re-sworn.

VAUGHAN, J., concurred.

May 2d.

BRADLEY v. MILNES.

A party cannot take advantage of an ambiguity in a traverse after having taken an issue upon it and gone to trial. Therefore where the plea

ASSUMPSIT for work and labour and materials found and provided.—*Plea* :—That by a certain agreement the sum demanded was to be paid upon the completion, by the plaintiff, of a building for the defendant, to the satisfaction of the defendant, or to the satisfaction of his surveyor; and that the building had not been completed to the satisfaction of the defendant, or to the satisfaction of his surveyor.—*Replication* :—That the building was

in assumpt was, that the sum demanded was payable upon the completion of a building to the satisfaction of defendant or his surveyor, and that it had not been completed to the satisfaction of either, and the plaintiff replied, that it was completed to the satisfaction of both, "without this, that it was not completed to the satisfaction of defendant or his surveyor," and issue thereon, *Held*, upon proof of completion to the satisfaction of the defendant and verdict for plaintiff, that no objection could be raised by the defendant after verdict.

completed to the satisfaction of the defendant, *and* to the satisfaction of his surveyor; *without this*, that it was not completed to the satisfaction of the defendant, *or* to the satisfaction of his surveyor. The defendant joined issue on the replication.

At the trial before *Park, J.*, it was in evidence that the building was completed to the satisfaction of the defendant. *Verdict* for the plaintiff.—*Atcherley, Serjt.* obtained a rule *nisi* to set the verdict aside; and he objected that upon the issue raised by the replication the plaintiff was bound to prove that the work was completed to the satisfaction of both the defendant and his surveyor.

Talfourd, Serjt. shewed cause.—The plea is in the alternative, and the substance of the issue has been proved; and in *Jones v. Clayton (a)*, that was held to be sufficient. In *May v. Brown (b)*, *Abbott, C. J.* says, "It is a general rule that a variance between the allegation and the proof will not defeat a party, unless it be in respect of matter, which, if pleaded, would be material." Here the plaintiff proved sufficient to entitle him to maintain the action. In *Spilsbury v. Micklethwaite (c)*, the same principle is acknowledged, and *Mansfield, C. J.* held, that if a plea of justification consist of two facts, each of which would, when separately pleaded, amount to a good defence, it was sufficient to support this justification, if one of the facts were found by the jury. To the same effect is *Co. Lit. (d)*. "If the lessee covenant with the lessor not to cut down any trees, and bind himself in a bond of 40*l.* for performance of covenants, and the lessee cut down ten trees, the lessor bringeth an action of debt upon the bond, and assigneth a breach that the lessee cutteth down twenty trees, whereupon issue is joined, and the jury find that the lessee cut down ten, judgment shall be given for the plaintiff, for sufficient matter of the issue is found for the plaintiff."

Atcherley, Serjt. contrd.—It was a condition precedent to the recovery of the money, that the plaintiff should do the work to the satisfaction of the defendant or his surveyor; but here the plaintiff has undertaken to shew that the work was done to the satisfaction of both, and although it would have been sufficient to have averred that it was done to the satisfaction of either, yet he must now prove the issue as it is raised. In *Moore v. Boulcot (e)*, which was an action to recover an attorney's bill, the plea was that the demand was for work done at law *and* in equity, and that the bill was not delivered a month before action brought; the replication pleaded that the bill was not for work done at law *and* in equity, and it was held ill for uncertainty.—[*Tindal, C. J.*—There the next step was a demurrer; here you plead over.]—*Goram v. Sweeting (f)*, decides that a traverse must be in the disjunctive and not in the conjunctive; and *Wood v. Badden (g)*, is to the same effect.

TINDAL, C. J.—There is no ground for the objection which has been raised to the evidence received in support of this issue. This question arises after a verdict has been found by the jury. The plaintiff in his replication replies,

(a) 4 M. & S. 349.

(b) 3 B. & Cress. 113.

(c) 1 Taunt. 148.

(d) *Co. Lit.* 282 a, n. (d).

(e) 1 Bing. N. C. 323.

(f) 2 Saund. 206.

(g) Hob. 119.

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first, that the work was done to the satisfaction of both the defendant and his surveyor, and then takes a traverse in the very terms of the plea, "without this that the work was not done to the satisfaction of the defendant, or to the satisfaction of his surveyor;" that is, in effect saying that the work was done to the satisfaction of one or the other of these parties. I agree that the defendant might have demurred specially to the replication, on the ground that the issue which it tendered was not sufficiently certain; but instead of doing that he joins issue, and goes to trial, and it is clear that as the pleadings stood, the plaintiff was bound to prove that the work was done to the satisfaction of the defendant or his surveyor; and if he had not done so, he would not have been entitled to a verdict; but as he has succeeded in proving it, justice has been done between the parties, and after verdict it is too late to take this objection, for by 4 *Anne*, c. 16, no advantage can be taken after verdict, for an immaterial traverse. The cases upon this point are collected in *Com. Dig.* tit. *Pleader*, G. 22, and a party cannot take advantage of an ambiguity in the language of a traverse after having joined issue, and taken the chance of a verdict.

PARK, J.—If the plaintiff had not proved at the trial that the work was done to the satisfaction of the defendant or of his surveyor, I should have directed a verdict to be given for the defendant.

GASELEE, J.—I have no doubt that the issue tendered by the plaintiff was in substance authorized by the agreement between the parties. In substance there was no doubt what the issue was, but if the defendant entertained any doubt he ought to have demurred.

VAUGHAN, J. concurred.

Rule discharged.

May 7th.

GILLOW and an^r, Executors, &c. v. Sir JOHN SCOTT LILLIE.

The defendant and an infant covenanted that they, or one of them, would pay a certain annuity —*Held*, that although the Annuity Act avoided the contract made by the infant, the covenant might be enforced against the defendant.

DEBT on an annuity deed. The *declaration* stated, that on the 14th of *August*, 1817, by a certain indenture, *Thomas Lillie* and the defendant, and each of them, did grant unto *George Gillow*, his executors, administrators, and assigns, for certain lives, one annuity or clear yearly sum of 120*l*. And the defendant did thereby for himself, his heirs, executors, and administrators, covenant, promise, and declare, with and to the said *G. Gillow*, his executors, administrators, and assigns, *that they the said T. Lillie and the defendant, or one of them, their or one of their heirs, executors, or administrators, should and would well and truly pay, or cause to be paid the said annuity unto the said G. Gillow, his executors, administrators, and assigns. Breach*: that the said *Thos. Lillie* and the defendant had not, nor had either of them, well and truly paid, or caused to be paid, the said annuity unto the said *G. Gillow*, in his lifetime, or to the plaintiffs, as his executrix and executors, since his death.

Plea: That the said *Thomas Lillie*, in the said indenture named, at the time of the making of the indenture was an infant within the age of twenty-one years, to wit, of the age of twenty years, whereby and according to the Statute in such case made and provided, the said indenture was void in law; and that the defendant was ready to verify, &c.

Demurrer and joinder.

Talfourd, Serjt., in support of the demurrer.—In *Haw v. Ogle* (a) it was held, that the several covenant of one grantor of an annuity is not avoided by the infancy of another who granted by the same deed. That case was decided under 17 *Geo.* 3, c. 26, sec. 6, and the provisions of sec. 8 of 53 *Geo.* 3, c. 141 (b), are similar to those in the former act; and therefore the case is precisely in point.

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Merewether, Serjt., contrd.—Here the plaintiff's testator has participated in an act which is declared to be a misdemeanor by sec. 8 of the Annuity Act, and his representatives cannot now come into court and take advantage of his own wrong. The law says, that such a covenant made by an infant shall be absolutely void, and the whole contract is therefore illegal.

TINDAL, C. J.—If this was a grant of a joint annuity, I am not prepared to say that the consequence pointed out by my brother *Merewether* might not follow, and that the annuity would not have been void as to both, although I do not now decide that point. But this is a separate grant of the annuity by the defendant; the covenant is, that one of the parties should pay, and there is no reason for saying, that where the grant of one is void by matter of law, that a separate grant by another party shall be also avoided.

The other judges concurred.

Judgment for the plaintiffs.

(a) 4 Taunt. 10.

(b) By section 8, all contracts for the purchase of any annuity with any person under the age of twenty-one years, shall be and remain utterly void, any attempt to confirm the same after such person shall have attained the age of twenty-one years

notwithstanding, and if any person shall by letter, agent or otherwise howsoever procure, engage, solicit, or ask any person being under the age of twenty-one years to grant any annuity, he shall be guilty of a misdemeanor.

GRIFFITH'S FINE.

May 8th & 12th.

MEREWETHER, Serjt., applied to the Court that a fine might be allowed to pass under the following circumstances:—There were three conusors; one in *England* and two in *India*; the *dedimus* was sent out to *India*, and the conusance of the two conusors was taken there, and the *dedimus* returned. The acknowledgment of the third conusor was taken in *Marlborough*, in *Wiltshire*, on the 4th of *April*, 1835, and it was afterwards discovered that the conusee to the fine died on the preceding 31st of *March*. The affidavits disclosed that all the persons interested in the passing of the fine were anxious that no delay should take place.—[*Bosanquet, J.*—The Master of the Rolls has spoken to me about this case; and under the circumstances, the Court is extremely anxious to assist you if it can be done.]

Cur. adv. vult.

The conusance of two conusors to a fine was taken in *India*, and the conusance of a third conusor was afterwards taken in this country; the conusee died a few days before the last conusance was taken; and under the circumstances of the case the fine was allowed to pass as to the two conusors in *India*.

Per Curiam.—The fine may pass as to the two conusors in *India*, and the conusor in this country can proceed under the new Statute 3 & 4 *Wm.* 4, c. 74.

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May 4th.

1. A clerk in a notary's office went out in the evening to present bills, and returned the same evening and entered in a book the answers he had received from each person, and this was the usual practice of the office:—*Held*, that after the death of the clerk, the entry was admissible to prove the dishonour of a bill.

2. The holder of a bill received due notice of dishonour and he wrote a letter the same day to the indorser stating the fact, but the letter was not received until the following day:—*Held* a sufficient notice to the indorser.

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ASSUMPSIT on a bill of exchange, indorsee against drawer. The bill was drawn by the defendant upon one *Wheeler*, and was indorsed by the defendant to the plaintiff.

At the trial before *Gaselee, J.*, at the *London* sittings, a notary's clerk gave the following evidence:—That on *Saturday*, the 8th of *June*, 1832, the day the bill became due, it was sent to the notary's office for the purpose of being presented for payment. That a copy of the bill was made in a book by one of the clerks of the office; and that *Manning*, one of the clerks, took the bill out of the office in the evening with other bills, and soon afterwards returned, when *Manning* wrote in the margin of the book opposite to the entry of the bill, "*Out of town and no orders.*" That *Manning* subsequently dictated to witness the substance of a ticket which contained the same statement as the entry in the margin of the book. The witness proved that this was the usual mode of conducting the business of the office. The book containing the entry in the hand-writing of *Manning*, opposite to the copy of the bill, and the ticket in the hand-writing of the witness, were produced at the trial, and on proof that *Manning* was dead, these documents were admitted in evidence.

It was also in evidence that notice was received on the following *Monday* by the plaintiff in *London* that the bill was dishonoured, and that the plaintiff, by a letter which was put into the two-penny post the same evening, informed the defendant in *London* that the bill was dishonoured, which was received by him on *Tuesday* morning.

The jury gave a verdict for the plaintiff.

Humfrey obtained a rule *nisi*, in pursuance of leave reserved to enter a nonsuit upon two grounds. *First*, That the entry of the deceased clerk was not admissible in evidence; and *Secondly*, That the notice of dishonour given to the defendant was too late.

Bompas, Serjt., and *Hoggins*, shewed cause.—*First*, Upon the death of the clerk the plaintiff had no other means of shewing the presentment of the bill than by producing the evidence given at the trial. *Doe d. Patteshall v. Turford (a)* is a strong authority in favour of the admissibility of the evidence. There it was the usual course of practice in an attorney's office for the clerks to serve notices to quit, and to indorse on duplicates of such notices the fact and time of service; and on one occasion the attorney himself prepared a notice to quit, and took it out with him, together with two others prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of his having delivered it; and two of them were proved to have been delivered by him on that occasion: and it was held, that after the attorney's death the indorsement so made was admissible evidence to prove the service of the third notice. And in that case Lord *Tenterden, C. J.*, lays stress upon the fact

that the indorsement was made by the attorney in the discharge of his duty: so here the entries were made according to the usual practice of the notary's office.

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In *Price v. Lord Torrington* (b), which was an action for beer sold and delivered, it was proved that the draymen were in the habit of coming every night to the clerk of the brewhouse to give him an account of the beer delivered out, which he entered in a book, and the draymen set their hands to it; and on proof that a drayman was dead, an entry in this book signed by him was held good evidence of a delivery. So in *Pitman v. Maddox* (c), in an action on a tailor's bill, a shop book was received in evidence; it being proved that the servant who wrote the book was dead, and that the entry was in his hand, and that he had been accustomed to make the entries. In *Hagedorn v. Reid* (d), the copy of a licence in a merchant's letter book, written by a deceased clerk, with a memorandum that the original had been sent to a correspondent abroad (and which entries were proved to be in the usual course of business), was admitted. In *Champneys v. Peck* (e), a bill with an indorsement upon it, "March 4, 1815, delivered a copy to C. D.," which indorsement was proved to be in the hand-writing of a deceased clerk of the plaintiff (whose duty it was to deliver a copy of the bill), was admitted in evidence, such indorsement being shewn to have existed at the time of the date. In *Pritt v. Fairclough* (f) an entry by a deceased clerk of the plaintiff in a letter book, professing to be a copy of a letter of the same date, from the plaintiff to the defendants, was held to be good secondary evidence of the contents of the letter, on proof that, according to the plaintiff's course of business, the letters which he wrote were copied by this clerk, and sent off by the post, and that in other instances the copies so made by the clerk had been compared with the originals, and always found correct. And so in *Warren v. Grenville* (g), an entry in an attorney's debt book was read after his death, because if he had been alive he might have been examined to prove the fact, and it was received as being the best evidence. The notice which was proved to have been received by the plaintiff on the following Monday, that the bill had been dishonoured, is also a fact to corroborate the entry made by the clerk in the book.

Kelly and Humfrey, in support of the rule.—In *Doe d. Patteshall v. Turford* (h), Mr. B. Parke says, that it was necessary to prove that the indorsement was made at the time it purported to bear date, and that it was then one of a chain or combination of facts from which the delivery of the notice might be lawfully inferred. But here the proof of the dishonour of the bill was a single isolated fact, which did not raise a presumption of any other fact. In *Chambers v. Bernasconi* (i), which has been before a court of error, but is not reported, the court of error held, that an indorsement of the place at which a party was arrested, made on the back of the writ by the officer who arrested him, was not evidence to prove the place of arrest, after the death of the officer.—[*Tindal*, C. J.—The decision of the Court turned upon this; that it was not the duty of the officer to make such an

(b) 1 Salk. 285.

(c) 2 Salk. 690.

(d) 3 Camp. 379.

(e) 1 Stark. N. P. 404.

(f) 3 Camp. 305.

(g) 2 Strange, 1129.

(h) 3 B. & Ado. 896.

(i) 1 Cr. & J. 451; 8. C. 1 Tyr. 335.

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indorsement on the writ. He was a mere volunteer.]—Nor was there any express evidence that the entry was made at the time of the transaction. In *Doe d. Patteshall v. Turford (j)*, the best evidence which could be procured was offered; but better evidence might have been produced of the presentment of the bill. It was made payable at 8, *King's Arms-yard, Coleman-street*, and some attempt should have been made to find the person who gave the answer to the clerk when he presented the bill, and obtained the answer which he entered in the book.

Secondly, The notice of the dishonour of the bill was given to the defendant too late. The letter ought to have been put into the post in time for the drawer to have received it the day after the bill was dishonoured. *Smith v. Mullett (k)* was an action by the fourth against the first indorsee, and all the parties resided in *London*; the plaintiff received notice of the dishonour of the bill from his indorsee on the 20th, and on the evening of the following day he put a letter into the twopenny post giving notice of the dishonour to his immediate indorsee, but the letter was not received until the morning of the 22d; and it was held, that the plaintiff by his laches had discharged all the prior indorsees, although the second indorsee and the defendant had both received notice of the dishonour on the 22d.

TINDAL, C. J.—No question can arise upon the last point; for if the bill, after being dishonoured on *Saturday*, were returned to the holder on *Monday* in regular course, no notice could be given to the defendant until the next day.

With respect to the first point, which is of considerable importance, it appears to me that the evidence was admissible, on the ground that it was an entry made at the time of the transaction, in the course and routine of business, by a clerk who had no interest to misstate what had occurred. If there had been any doubt whether the entry was made at the time of the transaction, the case must have gone down for trial again; but my impression is, that the evidence shewed that the entry was made at the time. I give my opinion, therefore, upon the assumption that the entry was made at the time. And this does not carry the law further than the decision in *Doe d. Patteshall v. Turford (j)*, which has been cited in the argument.

In the present case, it appears to have been the duty of the notary's clerk to go out in the evening, to present the bills for payment which had become due on that day; he then returns and makes an entry of the answers he has received in his book, opposite to the copy of the bill which has been previously entered. The first observation which arises, is that this is done by the clerk in the course of his duty; secondly, he had not the remotest interest in making a false entry; his interest was rather to make a true entry; the process of invention implies trouble, in such a case unnecessarily incurred, and a false entry would probably be the means of bringing disgrace upon him, and occasion his dismissal from his master's service. It is also to be remarked, that the book is open to all the clerks in the office, so that it would probably soon be discovered if false entries were made. The entry is, therefore, *prima facie* consistent with truth, and there are many circumstances which tend to confirm its correctness; and on *Monday* the

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letter is written to the holder stating that the bill had been presented and dishonoured, which harmonizes in point of time with the other circumstances, and adds another link to the chain which gives consistency to the whole. It has been urged by the counsel for the defendant that *Doe d. Patteshall v. Turford (1)* can only be supported on the ground that no other evidence could have been given than such as was offered; but it is going too far to say that no other evidence could be given, for there might have been persons present who heard the conversation when the notice was served. But in the present case, it would be a hardship equally great to require evidence from persons who were present when the bill was presented. It would involve the parties in great expense and difficulty, and if this evidence which has been received were now rejected, the security of bills would be much affected, and the holders of them be placed in a state of doubt and uncertainty. I am therefore of opinion, that the evidence was admissible.

PARK, J.—We should occasion great alarm in the mercantile world, if we were to overturn the numerous cases which have been cited by the counsel for the plaintiff. I fully concur with the observations made by Mr. Baron Parke in *Doe d. Patteshall v. Turford (1)*. He admits the evidence, first upon the ground that the entry was made by the clerk at the time of the transaction; and it is a material circumstance in this case, that the clerk came home directly and wrote the memorandum in the margin. Now the book bears every appearance of containing a true statement of the business transacted at the notary's office. There are seventeen bills presented on the day in question, and proper entries are made in the margin opposite the entry of each bill. It is objected, that the person who gave the answer to the notary's clerk ought to have been called; but the clerk is dead, and no person can be supposed to know who the person was who gave him an answer when he called at the acceptor's residence; and it would occasion a very serious expense to call all the parties who might possibly have been present when the presentment was made.

We have been pressed with the case of *Bernasconi v. Chambers*. I was one of the judges who decided that case in the court of error; but the decision turned upon this, that the sheriff's officer was going beyond the sphere of his duty by making an entry of the *place* where he had made the arrest, and that therefore it could not be received as evidence of that fact. We should overturn all the decisions on the subject made during my experience, which extends to upwards of forty years, if we rejected this evidence.

GASKLER, J.—I had no doubt at the trial but that the notary's clerk proved that the entry was made at the time of the transaction. The circumstances, one of which was the notice of the dishonour on the *Monday*, naturally followed each other, and the entry was one of a chain of circumstances.

Rule discharged.

Bosanquet, J., was sitting as commissioner of the great seal.

*Com. Pleas.**May 9th.*

After the Court of Chancery have issued an injunction to stay a cause, the Court will not grant a rule for interpleading.

ARAYNE v. LLOYD.

ATCHERLEY, Serjt., shewed cause against a rule which had been obtained under the Interpleader Act, 1 & 2 Wm. 4, c. 58, sec. 6, calling upon certain persons to interplead. It appeared, that on the 16th of *April* the Court of *Chancery* had stayed the cause by injunction.

Wightman and *Colquhoun*, in support of the rule.

Per Curiam.—The rule must be discharged.

Rule discharged.

May 5th.

WAITE v. JONES.

1. The alleged consideration for defendant's promise to pay money to the plaintiff was, the plaintiff's undertaking to execute "a certain deed of separation between him the plaintiff and his wife:" which deed had been already prepared but was not executed. *Held*, on demurrer, that as nothing appeared on the pleadings to shew that the deed of separation was illegal, the Court would not presume its illegality, and that the consideration was not illegal.

2. A party cannot enforce a contract where the consideration is illegal, either wholly, or in part.

DEMURRER to Plea. The declaration stated that on the 19th of *October*, 1833, defendant signed a certain memorandum in writing, whereby he agreed to and with the plaintiff, that the time mentioned in a certain deed of separation for the said plaintiff's quitting a certain house at *Holloway*, should be extended to the 9th of *December* then next inclusive; and also to pay the plaintiff the sum of 160*l.*, by eight half-yearly payments, towards Messrs. *Horne* and *Gates*' demand of 366*l.* 4*s.* 9*d.*, the said plaintiff taking the whole of such demand on himself; the payments to be made *at the times of the payment of the annuity mentioned in the said deed of separation*. And the defendant also agreed to pay 20*l.* towards liquidating certain outstanding debts at *Rickmansworth*, and also 220*l.* towards certain household expenses at *Holloway*, such last-mentioned sum of 220*l.* being divided into two payments; one half thereof being payable at *Michaelmas-day* then next, and the other half at *Lady-day* 1835; and by the said memorandum in writing it was stated, that the defendant agreed to the above in consideration of the plaintiff's executing the deed of separation, and agreeing to pay Messrs. *Horne* and *Gates*, and the household expenses and *Rickmansworth* debts in full. And the said plaintiff averred, that he, confiding in the said agreement of the defendant, and in consequence thereof, was induced to, and did then execute the said deed of separation in the said memorandum mentioned, that is to say, a certain deed of separation between the plaintiff and one *Mary* his wife, and agreed to pay the said Messrs. *Horne* and *Gates* in the said memorandum mentioned, their said demand of 366*l.* 4*s.* 9*d.*, and the said household expenses and *Rickmansworth* debts in the said memorandum in writing mentioned, in full; and then took upon himself the payment of the said demands, debts and expenses, whereof the defendant then had notice: yet the defendant did not nor would perform the said agreement, but wholly neglected and refused to make the first payment of the said sum of 220*l.* so agreed to be paid by the defendant towards the household expenses at *Holloway* as aforesaid; and which said first payment thereof, amounting to 110*l.*, under and by virtue of the said agreement or memorandum in writing, became due and payable, and ought to have been paid by the said defendant, at *Michaelmas-day* last, and the same still remained wholly due

and unpaid; and the plaintiff had by reason thereof been forced and obliged to pay, and was liable to pay the same out of his own moneys.

Plea.—That at the time of the supposed signing by the defendant of the supposed memorandum in writing in the declaration mentioned, and before and at the time of the commencing of this suit, the plaintiff was solely liable to pay the said Messrs. *Horne* and *Gates* the payments, the supposed agreement by the plaintiff to pay which payments, was by the said supposed memorandum in writing stated to be in part the consideration for the defendant agreeing as was alleged to be in the said supposed memorandum in writing agreed by the defendant; and that the plaintiff was at the said time of the supposed signing by the defendant of the said supposed memorandum in writing, and before and at the time of the commencing of this suit, solely liable to pay the said household expenses and *Rickmansworth* debts in full, the supposed agreement by the plaintiff to pay which household expenses and *Rickmansworth* debts in full, was by the said supposed memorandum in writing stated to be in part the consideration for the defendant agreeing as was alleged to be in the said supposed memorandum in writing agreed by the defendant, and that the defendant was ready to verify, &c.

Demurrer.—For that the said plea was double, and contained two distinct matters of defence (that is to say), first, the allegation that plaintiff was solely liable to pay the said Messrs. *Horne* and *Gates* the payments in the said plea in that behalf mentioned; and secondly, that the plaintiff was liable to pay the household expenses and *Rickmansworth* debts in full; either of which allegations, without the other, would have been equally as much a defence to the action as both the allegations together. *Joinder* in demurrer.

R. V. Richards, in support of the demurrer.—The plea is ill, for it does not answer the whole of the consideration which is mentioned in the declaration. The facts stated in the plea may be true, and the execution of the deed would still be a sufficient consideration to support the promise. But it will be contended, that the agreement by the plaintiff to execute the deed of separation is illegal. But all separation deeds are not illegal (a), and if this was illegal it ought to have been so alleged and shewn on the plea. And there is nothing stated to shew that this deed is illegal, and the Court will not presume its illegality. The mere execution of a deed is a sufficient consideration for the defendant's promise; for it has been held that the smallest amount of consideration is sufficient, *Starlyn v. Albany* (b), *Williamson v. Clements* (c), *Pullen v. Stokes* (d), *Trades v.* — (e); *Whitehead v. Groethuysen* (f). And even if the legality of the deed be doubtful, the execution of it would be sufficient; for in *Longridge v. Dorville* (g) it was held, that the giving up a suit respecting which the law was doubtful, is a sufficient consideration for a promise. And if one part of the consideration be legal, that is sufficient, *Pigot's case* (h); *Robinson v. Bland* (i). The

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(a) Roper's Husband and Wife, pp. 269, 288, last edit.

(b) Cro. Eliz. 67.

(c) 1 Taunt. 528.

(d) 2 H. Black. 312.

(e) 1 Sid. 57.

(f) 2 Bing. 464.

(g) 5 B. & Ald. 117.

(h) 11 Co. 27, b.

(i) 2 Burr. 1077.

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cases are collected in *The King v. The In. of Northwingsfield* (j). And admitting that the deed of separation could not be maintained in a court of law, the execution of it would be a sufficient consideration, if it be good in a court of equity, *Thorpe v. Thorpe* (k).

Ellis, contra.—The question is, whether a promise made by a man to execute a deed of separation between himself and his wife is a good consideration for a promise from a third person to pay money to the husband. If it were, the husband would be allowed to say that he had sold his wife for a price.—[*Tindal, C. J.*—How does that appear upon these pleadings?—In *Hartley v. Rice* (l), which was an action on a wager respecting marriage, Lord Ellenborough said, “On the face of the contract, its immediate tendency is to discourage marriage;” and *Le Blanc, J.* adds, “A contract to restrain marriage generally, has been determined to be illegal.” *Woodhouse v. Shipley* (m), *Baker v. White* (n), *Lowe v. Peers* (o), *Hall v. Potter* (p), are cases where the Courts have shewn their dislike to support bargains made upon the subject of marriage. In *Brown v. Peck* (q), and *Tenant v. Brai* (r), bequests made to a wife on condition that she would separate from her husband were held single. It is not disputed that deeds of separation may, in some cases, be legal; but the Court will not therefore assume that this was so.

Richards, in reply.—The Court will make every intendment in favour of the declaration, and against the plea. If in any case a deed of separation may be good, that is sufficient; for it lies upon the defendant to shew why this deed was illegal: and it is manifest here that the separation had been agreed upon before the agreement was made.

TINDAL, C. J.—This objection arises upon the consideration which is alleged to be the ground for the defendant's entering into the contract which is the subject of the action. That consideration consists of two distinct parts; first, the plaintiff's executing the deed of separation between himself and his wife; and secondly, his agreeing to pay certain demands and expenses in full. Now it may be conceded for the defendant, that if either part of the consideration is illegal, the plaintiff's right to recover falls to the ground; and *Featherston v. Hutchinson* (s) is a direct authority for that point. If, therefore, in this case we can see that any part of the consideration is illegal, the plaintiff can have no right to recover. It is contended for the defendant, that the intendment necessarily arising upon the facts stated in the declaration is, that the agreement to pay the money was made partly in consideration of the plaintiff agreeing to separate from his wife. If that were so, it is unnecessary to say that it would be an illegal consideration. But is that the fair intendment which arises from the statement in the declaration? We have no more right to impute illegality than we have to impute

(j) 1 Barn. & Adol. 915.

(k) 1 Lord Ray. 682.

(l) 10 East, 22.

(m) 2 Atk. 535.

(n) 2 Vern. 215.

(o) 4 Burr. 225.

(p) 3 Lev. 411.

(q) 1 Eden Ch. C. 140.

(r) Toth. 78.

(s) Cro. Eliz. 199.

fraud; and I think enough is shewn to make it appear that this was a perfectly innocent act.

It appears that the deed was already prepared, although not actually executed; for one of the provisions contained in the agreement is, that the time mentioned in a *certain deed of separation* for quitting a house at *Holloway* should be extended to the 9th of *December*. It is also a very important fact, that a provision for the payment of an annuity was provided for in that deed of separation; and we cannot understand this stipulation in any other way than that it was an annuity provided for the support of the wife. If it was so, why may not some friend or trustee come forward and, for the purpose of insuring a permanent provision for the support of the wife, agree to take upon himself certain payments on consideration of the husband's executing the deed? and this seems to me to be a fair and natural inference.

If the agreement had been illegal, the defendant might have set out the facts which made it so; but we cannot impute bad motives or misconduct, unless we find it stated; and as all that is stated here is reconcilable with a lawful undertaking, our judgment must be for the plaintiff.

CASELEE, J.—It appears that a separation had been agreed upon, but that the deed was not executed. It might have happened that disputes arose between the parties, and that the defendant undertook to pay the 220*l.* for the purpose of making the parties more comfortable; and the husband might have been relieved from the payment of the debts, for the purpose of enabling him to pay the annuity to his wife.

VAUGHAN, J.—Since my first acquaintance with *Westminster Hall*, the courts of law have viewed separation deeds with more favour than formerly. It is admitted that some deeds of separation are legal, and then the question is, whether any thing appears to shew that this was an illegal deed. If the money was to be paid as a price for signing a separation deed, no one would contend that the consideration was valid; but here, the inference to be drawn from the facts which appear is, that the parties were already separated; and the circumstances seem to shew that the defendant was a mere trustee for the wife. In deciding this case, we do not clash with the cases which have been cited. The deed was prepared, and the onus of proof lies upon the defendant; if he desired to impeach the deed, he ought to have shewn the illegality upon the record.

BOSANQUET, J.—I agree that if part of the consideration be illegal, it taints the whole transaction; and I also agree that the consideration would be illegal if the defendant had agreed to pay the money upon condition that the plaintiff should separate from his wife at that time. But the question is, whether we can collect any thing of that sort from this record? The deed is called in the agreement, a *certain deed of separation* between the plaintiff and one *Mary* his wife. Now it is clear that there are certain deeds of separation which are legal, and illegality is not to be presumed; and unless we can see upon the face of the pleadings that it is an illegal deed, we ought not to put an unfavourable construction upon it. If we conjecture at all, we must, upon the facts stated, conjecture that there had been a previous

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separation between the husband and wife; that the deed of separation had been prepared, and that the defendant was a third party assisting as a trustee to carry the arrangement into effect. However, excluding all conjecture, we cannot see upon the face of this declaration that the agreement was illegal.

Judgment for the plaintiff.

May 8th.

WILKINSON and STENNETT v. HALL and an'

Tenants in common must sever in an action, on 4 G. 2, c. 28, to recover double value for holding over, if the tenant held the premises by a separate demise from each tenant in common.

DEBT on Stat. 4 Geo. 2, c. 28, sec. 1 (a), to recover double the yearly value of certain premises. *Declaration* stated, that defendants, before and at the time of the giving the notice to quit and making the demand thereinafter mentioned, and from thence until a certain day, to wit, the 14th of June, 1834, held and enjoyed one undivided moiety or half part, the whole into two equal parts to be divided, of and in certain tenements, to wit, &c., as tenants thereof to the plaintiff, *Thomas Wilkinson*, and one other undivided moiety thereof, as tenants thereof to the plaintiff *William Stennett*; that is to say, as tenants thereof respectively from year to year, for so long a time as the plaintiffs and defendants should respectively please: *the reversion of the one undivided moiety of the said premises, during all that time belonging to the plaintiff, Thomas Wilkinson, and the reversion of the other undivided moiety thereof, during all that time, belonging to the said William Stennett*; and thereupon, whilst the defendants so held and enjoyed the said undivided moieties of the said tenements, as tenants thereof to the plaintiffs respectively as aforesaid, and whilst the said reversions thereof respectively so belonged to the plaintiffs respectively as aforesaid, to wit, on the 11th of December, 1833, the plaintiffs gave notice in writing to the defendants, and thereby demanded of and required the defendants to quit, and to deliver up the possession of the said tenements to the plaintiffs, or either of them, on the said 14th of June, 1834, provided the defendants' tenancy of the said premises originally commenced at that period of the year, or otherwise to quit and deliver up the possession of the said premises at the end of the current year of their tenancy thereof which should expire next after the end of half a year from the time of their being served with the said notice; and the plaintiffs averred, that the tenancies aforesaid ended and were duly determined by the said notice. That after the determination of the said

(a) By 4 Geo. 2, c. 28, s. 1, it is enacted, "That in case any tenant or tenants for any term of life, lives, or years, or other person or persons, who are or shall come into possession of any lands, tenements or hereditaments, by, from or under, or by collusion with such tenant or tenants, shall wilfully hold over any lands, tenements or hereditaments, after the determination of such term or terms, and after demand made, and notice in writing given for delivering the possession thereof, by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements or hereditaments shall belong, his or their agent or agents thereunto lawfully authorized, then and in

such case such person or persons so holding over shall, for and during the time he, she and they shall so hold over, or keep the person or persons entitled out of possession of the said lands, tenements and hereditaments as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators or assigns, at the rate of double the yearly value of the lands, tenements and hereditaments so detained, for so long time as the same are detained, to be recovered in any of his Majesty's courts of record, by action of debt, whereunto the defendant or defendants shall be obliged to give special bail, against the recovering of which said penalty there shall be no relief in equity."

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tenancies of the defendants as aforesaid, and whilst the defendants continued in possession of the said tenements as aforesaid, and the said plaintiffs were so entitled to the possession thereof as tenants in common thereof, to wit, on, &c., the plaintiffs, by a certain notice in writing then made and signed by them, and delivered to the defendants, demanded and required the defendants to deliver the possession of the said tenements to the plaintiffs; nevertheless the defendants, not regarding the Statute in such case made and provided, did not nor would, at the determination of the said term and tenancies as aforesaid, deliver the possession of the said tenements, or any part thereof, to the plaintiffs, or either of them, according to the said notice so given, and the demand so made as aforesaid, but wholly neglected and refused so to do; and on the contrary thereof, wilfully held over the said tenements after the determination of the said term and tenancies, and after the notice so given as aforesaid, and the said demand so made as aforesaid, for a long space of time, to wit, from thence hitherto, during all which time the defendants did keep the plaintiffs, and each of them, out of the possession of the said tenements, and every part thereof; they, the plaintiffs, during all that time being entitled to the possession thereof as tenants in common thereof, contrary to the form of the Statute in such case made and provided. And the plaintiffs averred, that the whole of the said tenements, during the said time of holding over the same, &c., were of great yearly value, to wit, &c.; and by reason of the premises, and by the force of the Statute in such case made and provided, the defendants became liable to pay the plaintiffs a large sum of money, to wit, the sum of 2666*l.* 13*s.* 4*d.*, being at the rate of double the yearly value of the said tenements, for so long as the same were so detained as aforesaid; and thereby, and by force of the said Statute, an action had accrued to the plaintiffs to demand and have, and they thereby demanded of and from the defendants, the said sum of 2666*l.* 13*s.* 4*d.*; yet the defendants had not paid the said sum of money above demanded, or any part thereof, to the damage of the plaintiffs of 200*l.*

Plea.—That the defendants did not before, or at any of the said times in the declaration mentioned, or at any other time whatsoever, hold or enjoy the said undivided moieties of and in the said tenements in the declaration respectively mentioned, or either of them, or any part thereof, as tenants to the plaintiffs jointly, upon any joint demise or letting whatsoever by them of the same, or any part thereof to the defendants; and that the defendants were ready to verify, &c.

Demurrer and joinder.

Merewether, Serjt. in support of the demurrer.—By the Stat. 4 *Geo.* 2, the tenants are treated as trespassers, and the plaintiffs may join in the action on that Statute as they might do in an action of trespass for mesne profits. Tenants in common may sue jointly, and they take the profits in common (*b*); and they must join in trespass for damage to the property they hold in common (*c*), and avow jointly in replevin, *Anonymous* (*d*). In *Martin v. Crompe* (*e*), *Holt, C. J.*, says, "If there are two tenants in common, of a reversion expectant upon a lease for years, upon which a rent is reserved,

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(*b*) Littleton, secs. 292, 315, 316.

(*d*) Sir W. Jones, 253.

(*c*) Com. Dig. Abr. B. 10, F. 6.

(*e*) 1 Lord Ray. 340.

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they may join in debt for the rent, or sever." So they may join in covenant, *Midgley v. Lovelace* (f). In *Powis v. Smith* (g), which was a joint action by two tenants in common for use and occupation, Bayley, J., said, "Where one action was sufficient it would be a manifest injury to the tenant that he should be put to the expense and trouble of appearing to two separate actions."

Comyn, contrd.—Where an action is brought, in respect of estate, tenants in common must sever; if in respect of contract, it must be shewn that there was a joint demise, or they cannot join. Here the tenancy is described as a tenancy from year to year, and the plaintiffs ought to shew a joint demise, and that is the issue offered by the plea. In *Powis v. Smith* (h), which has been cited, it was held, that a joint demise must be proved, or that a joint action could not be maintained. As the pleadings now stand, it does not appear that both the plaintiffs are interested in the whole damages. The Statute gives the double value as a compensation for rent, and if this had been an action for use and occupation, the plaintiffs must have severed in their action. In *Anonymous* (i), the tenant in common avowed for damage feasant, where damages are recovered and the distress returned, and the other tenant in common had an interest, and therefore it was held that he ought to have been joined in the avowry.

TINDAL, C. J.—This case may be determined by considering the situation of two tenants in common having a tenant in possession of their property without any joint demise; for this action under the Statute comes in place of the action which would have lain for the rent if the tenancy had not been at an end. Now *Littleton* says, sec. 316, "If two tenants in common make a lease of their tenements to another for term of years, rendering to them a certain rent yearly during the term, if the rent be behind, &c., the tenants in common shall have an action of debt against the lessee, and not divers actions, for that the action is in the personalty." And in sec. 317, "But in an avowry for the said rent they ought to sever, for this is in realty." So that if there be no joint demise there must be several actions of debt for rent, for a joint action is not maintainable, except upon a joint demise. Here it appears that the defendants held by separate demises from the tenants in common; so that in a distress and replevin there must have been separate avowries. The damages given by the Statute being given as a compensation for the rent, stand in the same situation as the rent itself; and if the plaintiffs could neither avow jointly or sue jointly for the rent, so neither by analogy can they sue jointly for that which stands in the place of rent; for persons cannot join in an action unless they have a joint interest. Suppose one of the plaintiffs should die after the double value had accrued, his share in the damages would go to his executor, and the land to his heir. The case of *Cutting v. Derby* (j), although it does not go so far as this case, affords some analogy to it; and there it is said, "Where one entire injury is done to both tenants in common, they shall have one entire remedy, but where the injury is separate they may have several actions." I am therefore of

(f) Car. 289.

(g) 1 Dow. & Ry. 492.

(h) 5 B. & Ald. 850; S.C. 1 Dow. & R. 492.

(i) 2 Sir W. Jones, 253.

(j) 2 W. Black.

opinion, that as these plaintiffs had no joint interest they could not join in this action

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PARK, J., and GASELEE, J., concurred.

BOSANQUET, J.—I am of the same opinion; and I think the language of the Statute 4 Geo. 2, c. 28, s. 1 (k), very much supports the opinion of the Court, for the Statute only contemplates one entire *reversion*, whilst by this declaration it appears that there are two undivided moieties in the premises, and two separate reversions.

Judgment for defendants.

(k) See *ante*, 170, note.

RAND v. VAUGHAN and DUFFIELD.

May 13th.

TRESPASS against two defendants.—*Pleas*:—*First*, a joint plea of *Not guilty*. *Second*, the defendant *Duffield*, as bailiff of *Vaughan*, the landlord of certain premises, justified the trespass under the 11 Geo. 2, c. 19, sec. 1, and the plea stated that the rent for which the distress was made, became due on the 25th of *March*, 1834, and that the goods of the plaintiff were fraudulently and clandestinely conveyed away, to prevent the distress, and that the distress was taken within thirty days after the carrying away of the goods.

Replication:—That the goods were conveyed away on the 24th of *March*, 1834, before the rent became due and payable; and issue thereon.

At the trial the jury gave a verdict for the defendant *Vaughan*, but found for the plaintiff on both the pleas pleaded by the defendant *Duffield*, with 10*l.* damages.

A rule *nisi* was obtained to enter judgment for the defendant *Duffield*, *non obstante veredicto*, upon the ground that the facts stated in the replication might be admitted, and that enough would still remain on the plea uncontradicted, to entitle the defendant to a verdict.

Henderson shewed cause.—There is no instance of the Court allowing judgment to be entered for a defendant *non obstante veredicto*, where a verdict is found for the plaintiff upon an issue taken by the defendant; the form of this application is therefore wrong. But admitting the form to be correct, it cannot be sustained, for in *Watson v. Main* (a), *Eyre, C. J.* said, "He was of opinion, and had before held, that under the Statute, goods removed before the rent actually became due, and was in arrear, could not be seized for rent;" and that decision has never been overruled.

Platt, contra.—If tenants can elude a distress by removing their goods the day before the rent becomes due, the Statutes give the landlord no adequate remedy; and in *Furneux v. Fotherby* (b), Lord *Ellenborough* said, "That he entertained considerable doubts upon the opinion expressed by

1. Under 11 Geo. 2, c. 19, s. 1, a landlord cannot follow and distrain goods clandestinely removed by the tenant, before the rent becomes due.
2. A defendant cannot move to enter a verdict *non obstante* where an issue is found against him, which he has himself taken.

(a) 3 Esp. 15.

(b) 4 Camp. 136.

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Eyre, C. J., in *Watson v. Main*, and that if the cause had turned upon that, he would have reserved the matter for the opinion of the Court.

Cur. adv. vult.

TINDAL, C. J.—This case comes before us on a motion to enter a verdict for the defendant *Duffield*, *non obstante veredicto*. The motion would, perhaps, have been more correct in point of form, if it had been a motion to arrest the judgment for the plaintiff, on the ground that enough still remains upon the defendant's special plea confessed by the plaintiff's replication, to bar the plaintiff's demand: for we are not aware that any instance can be produced, where the defendant, after an issue which he has taken has been found against him, has been allowed to have judgment entered in his own favour, *non obstante*. But we think there is no ground whatever for the motion in the one form or the other. The short question raised by the pleadings is, whether the Statute applies to cases where the tenant removes his goods fraudulently and clandestinely before the rent becomes due; and we are of opinion that such case is not provided for by the Statute. By the common law, the distress for rent was necessarily made upon some part of the demised premises, otherwise the tenant might rescue the distress, or bring an action of trespass. And it was only in case the landlord coming to distrain, saw the cattle on the premises, and the tenant to prevent the distress drove them off the premises, that the landlord could justify freshly following and distraining them. And the Statutes 8 Anne, c. 14, s. 2, and 11 G. 2, appear to have been passed with the view of removing such difficulty in the way of the landlord's remedy in the case of a fraudulent or clandestine removal of the tenant's goods off the premises. For it expressly empowers the landlord "to take and seize such goods, wherever the same shall be found, as a distress for the said *arrear of rent*; and the same to sell, and otherwise dispose of, in such manner as if the said goods *had been actually distrained by such landlord in and upon such premises for such arrears of rent*." It is the *place*, therefore, not the *time* of the distress, to which the Statute intends to apply the remedy: and indeed, it is obvious, that if the construction contended for by the defendant is adopted, as the landlord may, after five days next after the distress, sell the goods and pay himself the rent, he might do so in many cases before the rent became due, which never could have been intended. Looking to the intention of the Act, therefore, and the great uncertainty which would arise, if a removal of the goods at any time before the rent became due, would be sufficient to let in the provisions of the Act; for if at any time, how long before, would be the question; we think the present distress was illegal. We therefore think the law to have been correctly laid down by *Eyre, C. J.*, in *Watson v. Main* (c), upon which Lord *Ellenborough* appeared to have doubted only, but to have expressed no opinion, in 3 *Camp*. 136.

Rule discharged (d).

(c) 3 Esp. N. P. 15.

(d) A similar decision to the above was given by the Court of K. B. in *Northfield*

v. Nightingale, on a demurrer, argued by *Kelly*, in T. T. 1832, cited in *Woodfall's Land. and Tenant*, 2d ed. by Harrison, 321.

Ex parte SWIFT.

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May 12th.

ROBINSON moved that the name of an attorney of this court might be entered on the rolls of the court *nunc pro tunc*, as of *Trinity Term*, 1834, under the following circumstances, which were stated in affidavits. The attorney had been duly admitted and sworn an attorney of the court, but he had not caused himself to be duly enrolled. The applicant being concerned as attorney for the defendant in the case of *Humphreys v. Harvey* (a), an application had been successfully made to this court to deprive him of his costs in that suit, because he was not duly enrolled; and it was then decided that enrolment was necessary. The clerk to the attorney who had made that application had now commenced an action of debt for the penalty given by Stat. 2 Geo. 2, c. 23, for practising without being duly enrolled.

After an action for a penalty has been commenced against an attorney for practising without being duly enrolled, the Court will not allow the enrolment to be entered *nunc pro tunc*.

Robinson submitted that the attorney had been sufficiently punished for an omission which resulted from inadvertence, by the loss of his costs in the action. In *Mellish v. Richardson* (b) the Court allowed an amendment of a matter of form in the latest stage of the proceedings; and in *Ex parte Fry* (c), where an attorney had neglected to make an entry of his admission in the Master's book, *Patteson, J.*, allowed his name to be entered *nunc pro tunc*.

TINDAL, C. J.—We have no authority to accede to this application. If the rights of a third person had not been involved, we might have allowed the entry to be made *nunc pro tunc*; but here a person has brought an action to recover a penalty which is given by an act of parliament. It has been argued that the Court can order the records of the court to be amended in furtherance of justice; but that power has never been exercised without seeing that third parties are not thereby deprived of their rights.

The rest of the Court concurred.

Rule refused.

(a) By *Humphreys v. Harvey*, 1 Bing. N. C. 82, it was decided that it is the duty of an attorney to cause his name to be enrolled in the book of the clerk of the warrants in the Common Pleas, and that if he omits to do so, he is incompetent to obtain costs, although he may be otherwise duly qualified to act as an attorney, and *per Park, J.* "I come to this conclusion with

regret in this particular case, because it is probable that when the attorney signed the oath roll upon being sworn in this court, he thought he was thereby enrolled an attorney." See the next case, *Matthews v. Swift*, and Stat. 2 Geo. 2, c. 23, sec. 5.

(b) 7 Barn. & Cress. 819.

(c) 3 Dow. Pr. C. 328.

MATTHEWS v. SWIFT.

May 13th.

DEBT for penalties under Stat. 2 Geo. 2, c. 23, for practising as an attorney in this court without being duly enrolled (a). The defendant demurred specially to the declaration; and *Bompas, Serjt.*, for the plaintiff, had obtained a rule *nisi* for leave to amend.

The Court will not allow a plaintiff in a penal action to amend his declaration after

demurrer, where the amendment would not tend to the furtherance of justice.

(a) See the last case, *Ex parte Swift*.

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Robinson shewed cause.—The Court is already aware of the merits of this case by having decided *Humphreys v. Harvey* (b), and they will not aid a plaintiff in the prosecution of a claim for a penalty where the defendant is only guilty of a mistake. The Court requires great exactness from plaintiffs in the prosecution of penal actions, and they will not grant a new trial except in case of misdirection by the judge in point of law, *Brook v. Middleton* (c), *The King v. Mann* (d). And in *Rankin v. Marsh* (e) the Court refused to allow any amendments to be made in a penal action where the defendants had been guilty of delay in carrying on the suit. Here the omission of the name was discovered in May, 1834, and this action was not commenced until *Hilary Term*, 1835.

Bompas, Serjt., *contrd.*—When an application like this is made, the Court will not look to the merits of the case. In *Maddock v. Hammett* (f) the Court allowed amendments in a penal action even after the time permitted for bringing a new action.—[*Tindal*, C. J.—In *Rex v. Mayor of Gram-pound* (g) it is said that the Court will be cautious in permitting amendments to be made, unless they tend to the furtherance of justice; and in writs of right, amendments are not allowed at all.]—It is true that amendments are refused in writs of right, but that strictness has never been extended to penal actions.

TINDAL, C. J.—The cases have laid it down that amendments are in the discretion of the Court, and they must be made according to law; but it seems to me, that we have at least a right to look at the nature of the action before we allow the amendment, although we ought not to weigh the merits of the case. Here we have already had the whole matter before us, and we find a penal action brought upon a Statute to recover a penalty, where the omission to conform with the provisions of the Statute was a mere inadvertence. In such an action we are warranted in refusing leave to amend.

GASELEE, J., concurred.

VAUGHAN, J.—In this instance we have judicial notice of the nature of the action, and that the neglect of the defendant to comply with the provisions of the Statute did not arise from any criminality. It would therefore be extremely cruel to assist the plaintiff in recovering the penalty; and if we are to be allowed any discretion in the matter, I would never permit an amendment on such an occasion.

BOSANQUET, J.—If this amendment were allowed it would not be a furtherance of justice.

Rule discharged (A).

(b) 1 Bing. N. C. 62.

(c) 10 East, 269.

(d) 4 M. & S. 337.

(e) 8 T. R. 80.

(f) 7 T. R. 55.

(g) 7 T. R. 699.

(h) See *Cross v. Kaye*, 5 T. R. 543.

KELCEY, Assignee of FORDRED, an Insolvent, v. MINTER
and an^r

Com. Pleas.

TROVER by the assignee of *Fordred*, an insolvent. *Plea*.—That before the said *Fordred* subscribed his petition, to wit, &c., the defendants, by a judgment, recovered against the said *Fordred* a certain debt and costs, and that the said debt and damage being unpaid, the defendants for the obtaining satisfaction thereof, afterwards and before the said *Fordred* subscribed his said petition, to wit, on, &c., sued and prosecuted out of the court of our lord the King, a certain writ called a *fiery facias*, directed to the sheriff of *Kent*, by which said writ our said lord the King commanded the said sheriff that of the goods and chattels of the said *Fordred*, in the bailiwick of the said sheriff, he should cause to be levied the debt and damages aforesaid; and that he should then have that money before our said lord the King at *Westminster*, on the 23d of *January*, in the said year last aforesaid, to render to them for their debt and damages aforesaid, and that the said sheriff should then have there that writ: which writ afterwards and before the delivery thereof to the said sheriff, as thereafter mentioned, and before the said *Fordred* subscribed his petition, to wit, on, &c., was duly indorsed to levy, &c.; and which writ afterwards and before the return thereof, and before the said *Fordred* subscribed his said petition, to wit, on, &c., was delivered to one *D. G. James*, esq., then being sheriff of the said county, to be executed; by virtue of which writ the said *D. G. James*, afterwards and before the said *Fordred* so subscribed his said petition, to wit, on, &c., seized and took the goods and chattels in the declaration mentioned, for the purpose of levying the moneys by the indorsement directed to be levied; which seizure and taking under the said writ, were the same conversion and disposition as in the declaration mentioned; and that the defendants were ready to verify.

Where goods are seized, under a judgment entered upon a warrant of attorney, before the imprisonment of an insolvent, and are sold by the sheriff after the imprisonment, the execution creditor is liable to an action of trover, at the suit of the insolvent's assignee, to recover the goods. See 7 Geo. 4, c. 57, sec. 34.

Replication.—That before the said judgment in the plea mentioned was recovered against the said *Fordred* by the defendants, to wit, on &c., the said *Fordred* executed a certain warrant of attorney.—[Here a warrant of attorney, given to the defendants to secure the sum of 600*l.* and costs, was set out in the usual form.]—That the said judgment in the plea mentioned was afterwards, to wit, on, &c., obtained upon the said warrant of attorney; and the said writ, in the said plea mentioned, was issued upon the judgment so obtained as aforesaid: that the imprisonment of the said *Fordred*, from which he was so discharged as in the declaration mentioned, commenced on the 8th of *February*, 1833; and that the said goods and chattels in the declaration mentioned, which had theretofore been so seized and taken, as in the plea mentioned, were sold under the said writ so issued, and judgment so obtained as aforesaid, after the commencement of the imprisonment of the said *Fordred* as aforesaid, contrary to the true intent and meaning, and provisions of the Statute, in that case made and provided; and that the plaintiff was ready to verify, &c.

Rejoinder.—That the insolvent gave the said warrant of attorney upon compulsion, as a security for money due to the defendants.—*Demurrer* and *joinder*.

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Bayley, in support of the demurrer.—The rejoinder offers no answer to the replication, which avers that the goods were sold after the commencement of the imprisonment of the insolvent. The sale took place after the imprisonment of the insolvent, and by sec. 34 of the Insolvent Act, 7 G. 4, c. 57 (a), it is enacted, that no person shall avail himself of any execution after the imprisonment of the insolvent, either by seizure and sale of the property of the prisoner, or by sale of such property theretofore seized.

Manning contra—The replication does not shew that the goods were sold by the defendant; they were sold by virtue of a writ, which was issued before the imprisonment, namely, on the 23d of *January*: if the sheriff had done his duty, he could have sold the goods before, and no question could then have arisen. The sheriff therefore was the party to blame, and he may be liable to an action at the suit of the plaintiffs, *Notley v. Buck* (b). The money may now be in the sheriff's hands, awaiting the decision of the Court as to its distribution.

TINDAL, C. J.—This case seems to be brought expressly within the provision in the Statute, of a seizure before, and a sale after the commencement of the imprisonment of the insolvent. In *Notley v. Buck* (b), the pleadings expressly averred that the sheriff had notice of the bankruptcy; and there he was a wrong doer, as he did not pay over the money to the assignees, to whom it belonged; and although there the Court did not say that an action would lie against the execution creditor, yet on general principles the procurer is as much liable as the agent. Upon this record it appears that the defendants issued the writ of *fiery facias*, and delivered it to the sheriff to obtain satisfaction for the debt and damages which they had recovered, and the sheriff sold the goods in the ordinary course of his duty. And the replication here shews that the sale was made by the authority of the defendant.

The other judges concurred.

Judgment for the plaintiff.

(a) By sec. 34, "in all cases where any prisoner who shall petition the said court for relief under this act, shall have executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem*, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself or herself of any execution issued or to be issued upon any judgment obtained or to be obtained

upon such warrant of attorney, or *cognovit actionem*, either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property theretofore seized, or any part thereof, but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or *cognovit actionem*, shall and may be a creditor or creditors for the same under this act."

(b) 8 Barn. & Cress. 160.

HAWES and o^r v. BENJ^r JOHN ARMSTRONG.

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ASSUMPSIT. The declaration stated that, before and at the time of the making of the promise and undertaking of the defendant thereafter mentioned, *John Thomas Armstrong* and *Leonard Dell* were indebted to the plaintiffs in 260*l.*, and being so indebted the plaintiffs were desirous and urgent to be paid the same, and thereupon on the 13th day of *May*, 1829, in consideration that the plaintiffs, at the request of the defendant, would give time for the payment of the said debt of 260*l.*, and would accept and receive by way of security for the payment of the same, three bills of exchange, drawn by the said *J. T. Armstrong*, upon and accepted by the said *L. Dell*, and bearing date the 8th day of *May*, 1829, that is to say, one bill of exchange for 85*l.*, four months after date, one other bill of exchange for 85*l.*, eight months after date, and one other bill of exchange for 90*l.*, twelve months after date, and would forbear and give time to the said *J. T. Armstrong*, and *L. Dell*, for payment of the said debt of 260*l.*, until the said bills should respectively become due; the defendant undertook and promised the plaintiffs that in default of the said bills not meeting due honour, he, the defendant, would see the same paid. And the plaintiffs averred that they, confiding in the said promise of the defendant, did then, to wit, on, &c. take, accept, and receive by way of security for the payment of the said debt of 260*l.* the said three bills so drawn and accepted as aforesaid; and did forbear and give time to the said *J. T. Armstrong* and *L. Dell*, for payment of the said debt, until the said bills became due; that although the said three bills had become due and payable, and although the same were, duly presented for payment, and although the said *L. Dell* did not, nor did the said *J. T. Armstrong* duly honour the said bills, or either of them, when they were so presented (of all which premises the defendant had due notice), and although the defendant was afterwards, to wit, &c., requested by the plaintiffs to see the three said bills paid, yet the defendant did not see the said bills paid, nor had he paid the moneys mentioned in them, &c. To the plaintiffs' damage, &c.

Plea.—That there was not any memorandum or note in writing, signed by defendant, or by any person by him thereunto lawfully authorized, of the said supposed promise and undertaking in the declaration mentioned, or of any promise or undertaking of, or by him, the defendant, to answer for the said debt or default in the declaration mentioned, or any debt or default of the said *J. T. Armstrong* and *L. Dell*, or either of them, or otherwise, as required by the Statute in such case made and provided, to charge him for such debt or default.

Replication.—That there was and is a certain memorandum or note in writing, made and signed by the defendant, of the said promise and undertaking in the said declaration mentioned, thereby charging himself with the said debt and default of the said *J. T. Armstrong* and *L. Dell*, and which said note or memorandum was addressed to the said plaintiffs in the following words, that is to say:—"Messrs. *Hawes* [meaning the said plaintiffs], gentlemen, enclosed, I [meaning the said defendant] forward you the bills [meaning the said bills in the said declaration mentioned], drawn *per J. T. Armstrong*, upon and accepted by *Leonard Dell* [meaning the said *J. T. Armstrong* and *L. Dell*, respectively, in the said declaration mentioned],

The declaration stated, that in consideration that the plaintiffs gave time for payment of a debt to A. and B. and received bills at certain dates for that purpose, the defendant undertook to see the bills paid. **Plea:** that there was no note in writing of the undertaking to satisfy the Statute of Frauds. **Replication:** that there was the following note in writing addressed to the plaintiffs: "Enclosed I forward you the bills drawn by A. upon and accepted by B., which I doubt not will meet due honour, but in default thereof, I will see the same paid;" and by inuendo the bills and parties were averred to be the bills and parties mentioned in the declaration. **Held,** on demurrer, that no sufficient consideration appeared to support the defendant's undertaking.

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which I doubt not will meet due honour, but in default thereof I will see the same paid. I remain, gentlemen, your's, very respectfully, *B. J. Armstrong* [meaning the said defendant]. *Hatton Wall, 13th of May, 1829,*" as by the said writing would more fully appear.

Demurrer.—And for causes of this demurrer in law, the defendant, according to the form, &c. shews, for causes thereof, that the said supposed promise and undertaking of the defendant in the said replication mentioned, is a special promise or undertaking in writing for the debt or default of others, to wit, the said *J. T. Armstrong* and *L. Dell*; and the plaintiffs seek to charge the defendant on such special promise; but the said undertaking or promise stated and set forth in the said replication, does not contain or set forth the consideration for such promise or undertaking, or shew that the consideration for such promise and undertaking, as well as the promise and undertaking itself, was in writing, which is, by law and the Statute in such case made and provided, necessary, in order to make such promise binding upon the defendant; and also for that the said supposed promise and undertaking of the defendant in the said replication mentioned, being a promise and undertaking for the debt or default of others, is not a promise or undertaking upon which the defendant can be bound, or upon which he can be made liable, but was and is, by force of the Statute in such made case and provided, void in law; and also for that the said replication is a departure from the declaration, in this, to wit, that the declaration states the supposed promise and undertaking of the defendant to have been made upon and for a good consideration, to wit, the consideration stated in the declaration, but the supposed promise and undertaking in the said replication mentioned, is a naked promise, without any consideration whatever; and also for that the said replication to the said plea is in various other respects defective, insufficient, and informal, &c. *Joinder* in demurrer.

R. V. Richards, in support of the demurrer.—The question is, whether a good undertaking has been given by the defendant to satisfy the Statute of Frauds. It is now well settled that the *consideration* as well as the *promise* must be in writing. In *Wain v. Warlters* (a), Lord *Ellenborough* says, "The clause in question, in the Statute of Frauds, has the word *agreement* ('unless the *agreement*, upon which the action is brought, or some memorandum or note thereof, shall be in writing, &c.'). And the question is, whether that word is to be understood in the loose, incorrect sense in which it may sometimes be used, as synonymous to *promise* or *undertaking*, or in its more proper and correct sense, as signifying a mutual contract or consideration between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect."

James v. Williams (b) is a case very similar to the present, and there the rule laid down in *Wain v. Warlters* (a) was confirmed, and Mr. *J. Patteson* added, "that the consideration must be collected from the expressions in the instrument, not as matter of conjecture, but with certainty." In *Cole v. Dyer* (c), which was an action on a guarantee, Lord *Lyndhurst* says, "On

(a) 5 East, 10.
 (b) 3 Dow. Prac. C. 481.

(c) 1 Cr. & J. 464.

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looking at this instrument, various interpretations might be put upon its language, and several considerations, without much ingenuity, conjectured. It appears to me, that if, in such a written agreement to be answerable for the debt of another person, two distinct considerations may, with equal probability, be inferred, as the inducement for that engagement, the writing is not taken out of the operation of the Statute of Frauds, and consequently can give no right of action." In *Lees v. Whitcombe* (d), Burrough, J., says, "There is no consideration expressed in this agreement for the defendant's undertaking, and since the case of *Wain v. Warlters*, that is indispensable." To the same effect is *Saunders v. Wakefield* (e). Then does this letter shew any consideration? In *Jenkins v. Reynolds* (f) it was held, that the following undertaking did not shew a sufficient consideration:—"To the amount of 100*l.* consider me as a security on J. C.'s account." In *Morley v. Boothby* (g) the words of the undertaking were, "Messrs. M. and Co., We hereby promise that your draft on W. C. and Co., due at six months on the 27th of November next, shall then be paid out of money to be received from St. Philip's Church, say 17*l.* 13*s.* 5*d.*," and it was held void for want of shewing a consideration.—[Tindal, C. J.—It is manifest that no consideration is expressed there, and no further time for payment is given.]—Nor does it appear on the undertaking given by this defendant, that further time for payment was given by the bills which were enclosed; and as was said in *Cole v. Dyer* (h), the Court will not speculate upon what the consideration might have been, but it must appear upon the face of the undertaking; and such is the doctrine laid down in all the modern cases. There is another point which arises upon the pleadings. The plaintiffs ought not to have replied that there was a note in writing, for that is unnecessary, *Lysaght v. Walker* (i), and it amounts to this, that evidence is put upon the record; the replication is also a departure from the declaration.

Comyn, contrd.—As to the last objection, every fact which is pleaded may be called evidence, and the replication supports the promise stated in the declaration. But the main question is, whether a sufficient consideration for the promise of the defendant appears. *Wain v. Warlters*, and all the cases cited, disclosed a mere naked promise to pay, without any consideration being stated. But here, by reasonable inference, the Court must perceive that the consideration stated in the declaration is the consideration for the promise. *Morris v. Stacey* (j) is precisely in point. There the promise was in these words: "I herewith hand you drafts drawn by Mr. Wallis and accepted by Mr. Bromley, and indorsed by R. Burns, and should the bills not be honoured when due, I promise to see that they do so;" and Gibbs, C. J., held that the undertaking was binding. *Boehm v. Campbell* (k) is another case very similar to the present. That was an action on a guarantee, and the declaration stated the consideration to be the giving time for payment to the original debtors; and the defendant's undertaking was as follows:—"Our mutual friends, Messrs. Sawyer and Co., having accepted the underwritten bill, drawn on them by your firm, I hereby give my guarantee

(d) 5 Bing. 37.

(e) 4 B. & Ald. 595.

(f) 3 Brod. & Bing. 14.

(g) 3 Bing. 107.

(h) 1 Cr. & J. 464.

(i) 5 Bligh. 2.

(j) 1 Holt, N. P. C. 153.

(k) 3 B. Moore, 15.

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for the due payment of the same, should it be dishonoured by the acceptors." And the observations of *Dallas*, C. J., are very important; he said, "This case was similar to that of *Morris v. Stacey*, namely, that in consideration that the plaintiff would forbear to sue *Sawyer* and Co., and take a bill drawn on, and accepted by them, the defendant undertook to guarantee its payment, if it should be dishonoured by them. This was sufficiently set out in the declaration. The jury were satisfied that no fraud had been practised. In *Ex parte Minnett* (14 Ves. jun. 189), Lord *Eldon* expressed serious doubts of the propriety of the decision in *Wain v. Warlters*, and in *Ex parte Gardom* (15 Ves. jun. 286), his lordship decided against the rule as laid down by the Court of *King's Bench*." Again, in *Newberry v. Armstrong* (1) it was held, that the consideration for a guarantee sufficiently appeared in the following undertaking:—"I, the undersigned, do hereby agree to bind myself to be security to you for *J. Corcoran*, late in the employ of *J. Pearson*, of *London Wall*, for whatever you may intrust him with while in your employ, to the amount of 50*l.*, and in case of any default to make the same good." Another modern case confirms those which have already been cited for the plaintiffs. *Shortridge v. Cheek* (m) was an action on the following guarantee:—"You will be so good as to withdraw the promissory note, and I will see you at *Christmas*, when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole 45*l.*" A promissory note for 35*l.*, made by the defendant's son, and payable to the plaintiff, was proved at the trial; and it was held, that the consideration, viz. the withdrawing of the note, was sufficiently stated to satisfy the Statute of Frauds, though the amount and maker's name were not specified, there being no evidence of any other note to which the agreement could apply; and Mr. *J. J. Parks* observes, "A guarantee is to receive its application from the state of the facts as shewn in evidence. Here there was no proof of any promissory note but one;" and Mr. *J. Littledale* says, "I think there was a sufficient consideration stated within the Statute. It is true, the letter leaves it uncertain what the note was, and whether it was a note of the father or of the son; and if it had appeared that there were two notes, one given by each, I do not think parol evidence could have been received to shew which was meant. So if there had been two notes in question for the same sum, but of different dates. But when upon the evidence only one note appears to be in question, no such explanation is necessary, and the statement in writing is quite sufficient." And it is to be remarked, that in most of these transactions parol evidence is necessary to elucidate and explain the intentions of the parties.

In the present case, the whole of the pleadings are to be taken together: the declaration states the consideration to be the giving further time to *Armstrong* and *Dell* to pay a debt, by receiving certain bills of exchange at a given date in payment, which bills are referred to in the letter written by the defendant. The plaintiffs having consented to receive these bills, they could not have brought an action for the consideration upon which they were founded against the original debtors, until after they became due, and the arrangement was therefore binding upon them. No doubt can be entertained but that the bills enclosed in the letter are those referred to in the declara-

tion; therefore a sufficient consideration appears to support the undertaking of the defendant.

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Richards, in reply.—*Morris v. Stacey* (n) was decided in 1816, and by subsequent cases which have already been cited, that decision has been overruled; and *Boehm v. Campbell* (o) being decided on the authority of *Morris v. Stacey*, must fall with it. The real point now to be decided is, whether *Wain v. Warlters* (p) shall be upheld or not. That case has never been overruled; for in *Boehm v. Campbell* the Court said it was unnecessary to express any opinion upon it.—[*Tindal*, C. J.—The argument on the other side is, that here the consideration is shewn in the declaration, and that it is afterwards referred to in the defendant's letter, when he mentions the bills which are enclosed.]—[*Bosanquet*, J.—The declaration professes to set out the effect of the contents of the letter.]—The consideration ought to appear upon the letter. The letter is the test and not the declaration.—[*Tindal*, C. J.—It is too much to say that all the bills must be copied in the letter. It is averred in the declaration, that the bills are of certain dates and amounts, and you do not deny that.]—The Statute of Frauds has always been construed strictly, and the consideration for the promise, as well as the promise, must be in writing. The most that can be shewn by parol, is the amount of damages sustained. Here the undertaking is a bare promise, "If *A. B.* does not pay, I will." Several considerations may be conjectured as the inducement for the defendant's engagement, as was said in *Cole v. Dyer* (q). *Newberry v. Armstrong* (r) was the case of a prospective agreement, and, as was said by Mr. *J. Park*, the consideration was the party's being employed and intrusted.—[*Tindal*, C. J.—This is a very important point, and we shall consider our judgment.]

Cur. adv. vult.

TINDAL, C. J.—The question which has been argued before us on these pleadings is this, whether the consideration which is stated in the declaration as the ground of the defendant's promise, appears upon the memorandum or note in writing signed by the defendant, which is set forth in the replication. That in order to satisfy the provisions of the Statute of Frauds, the consideration upon which the promise is made must appear on the written memorandum on which the action is brought, as well as the promise itself, has been settled by the authority of numerous decisions, of which the first is that of *Wain v. Warlters* (p), the ground of such decision being simply this, that the term "agreement," used in the Statute, includes both the consideration for the promise, and the promise itself.

May 12th.

The consideration is thus stated in the declaration in the present case, "that the plaintiffs, at the request of the defendant, would give time for the payment of the debt of 280*l.* then due from *John Thomas Armstrong* and *Leonard Dell*, and would take, accept, and receive, by way of security for the payment of the same, the several bills of exchange set out in the declaration, and would forbear and give time to the said *Armstrong* and *Dell* for payment of the said debt or sum of 280*l.* until the said bills should

(n) 1 Holt, N. P. C. 153.

(o) 3 B. Moore, 15.

(p) 5 East, 10.

(q) 1 Cr. & J. 464.

(r) 6 Bing. 301.

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respectively become due and payable;" and whether this consideration sufficiently appears in the written memorandum, is the point in dispute.

That such consideration does not appear expressly and in terms, in such memorandum, is apparent on the bare inspection of the writing itself.

It is not, however, necessary that such consideration should appear in *express terms*; it would undoubtedly be sufficient in any case, if the memorandum is so framed that any person of ordinary capacity must infer from the perusal of it, that such and no other was the consideration upon which the undertaking was given. Not that a mere conjecture, however plausible, that the consideration stated in the declaration was that intended by the memorandum, would be sufficient to satisfy the Statute, but there must be a well-grounded inference to be necessarily collected from the terms of the memorandum, that the consideration stated in the declaration, and no other than such consideration, was intended by the parties to be the ground of the promise.

Now looking at the memorandum in this case, and reading it as persons of ordinary understanding would read it, we cannot come to the conclusion that giving time, and forbearance to sue, was necessarily the consideration for the promise of the defendant.

It may have been so undoubtedly, and most probably it was. But the consideration may also have been for any thing to the contrary to be collected from the written agreement, an engagement on the part of the plaintiffs to extend their credit to *Armstrong* and *Dell*, or an engagement by the plaintiffs to discount these bills for *Armstrong* and *Dell*. For there is nothing whatever in the letter itself that necessarily connects the undertaking of the defendant with the consideration of forbearance: no expression to denote that the bills are delivered in satisfaction of, or as security for, the debt then due from *Armstrong* and *Dell* to the plaintiffs, not even any mention that any debt was due to them; undoubtedly, it is extremely probable, from the amount of the debt due from *Armstrong* and *Dell* agreeing exactly with the amount of the bills inclosed in the letter, that such bills were sent as a security for the debt then due, and if so, that the forbearance for the time the bills had to run must have formed the ground for the promise of the defendant; but there is no *written evidence* to shew that such was the case; and after proof of the existence of such debt by parol evidence (which might be admitted), the great link in the chain of the evidence would still be wanting, and there would be nothing but parol evidence to supply it, namely, that the forbearance of suing for that debt, was the consideration for the particular promise.

Thinking, therefore, in this case, that the consideration for the defendant's promise is left in complete uncertainty upon the defendant's letter, we cannot bring ourselves to the conclusion that the memorandum is sufficient to take the case out of the Statute of Frauds; and consequently we hold that there must be judgment for the defendant.

Judgment for the Defendant.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Trinity Term, 1835.

HENRY MILLER, Demandant; MARY MILLER, Tenant.

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May 28th.

BOMPAS, Serjt. had obtained a rule calling upon the demandant to shew cause why the writ of summons in this cause and all the proceedings thereon should not be set aside for irregularity. The issue in the cause had been delivered by the demandant on the 10th of *April*, made up as follows: "Therefore the sheriff is commanded that he summons, by good summoners, four lawful knights of his county, girt with swords, that they be here *on the 20th day of April next ensuing*, to make election of the assize aforesaid, the same is given to the parties aforesaid, here to have the election of the assize aforesaid, here, &c."

After the delivery of the issue a notice was left with the tenant's attorneys, stating that a writ of *venire* had been directed to the sheriff of *Middlesex*, commanding him to summon the knights on the 24th day of *April*, and that the knights would appear on that day to choose the recognitors.

The knights appeared in Court on the 24th of *April*, and it was then objected for the tenant, that the knights could not be sworn, for that by the issue which had been delivered, it appeared that the return day of the writ of summons had been altered. The Court ordered the knights to be sworn, and suggested that a motion should be made on the subject of the irregularity, and this rule was accordingly obtained on the 12th of *May*.

The demandant in a writ of right sued out a writ of summons with a wrong return day, and after having delivered the issue and deposited the writ with the sheriff, he caused the return to be altered and the writ to be resealed, and notice of the alteration was given to the tenant:—*Held*, that the writ was valid, it not being executed when the alteration was made.

Busby, in shewing cause, took a preliminary objection to the affidavits upon which the rule was obtained.—The writ described the names of the parties as *Henry Miller*, demandant, and *Mary Miller, widow*, tenant; but the affidavit omitted to describe the tenant as a *widow*, and it was sworn that two persons named *Mary Miller* resided on the property sought to be recovered.

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Bompas, Serjt.—The writ need not have described the tenant as a widow. If the writ had described the tenant as spinster, merchant, gentleman, or esquire, no such description need appear upon the affidavit.—[*Tindal*, C. J., said that the decided cases did not warrant the Court in assenting to the objection.]

Busby then shewed cause.—By the affidavits it appears that a writ of summons had been issued, returnable on the 20th of *April*, which was left at the sheriff's office, and the issue was then made up and delivered; it was subsequently ascertained that the return day was incorrect, there not being fifteen days between the *teste* and return, and that the Court did not sit on the 20th of *April*, whereupon, before the writ had been in any manner executed by the sheriff, the return day was altered to the 24th of *April*, and the writ was re-sealed and returned again to the sheriff. On the 20th of *April* the notice that the knights would appear on the 24th was also left with the tenant's attorneys, and the issue had since been re-delivered, properly made up. Upon these facts two objections arise. *First*, This application is too late; the objection to the return day of the writ might have been made by the tenant before the receipt of the notice on the 20th of *April*; and the tenant has been guilty of still greater laches, for the knights were sworn on the 24th of *April*, and the present rule was not obtained until the following 12th of *May*, and the demandant had taken steps in the cause, in the intermediate time. *Secondly*, The alteration was made in the writ before it had been in any manner executed, and it was regularly re-sealed and returned to the sheriff. In *Durden v. Hammond* (a), it was held that before a writ is returnable, it may be altered as to the return day, and there is no difference in the practice of the Courts, as to amendments between writs of right and other writs, not even when the proceeding is by attachment of privilege, *Popkins v. Smith* (b).

Bompas, Serjt., in support of the rule.—In *Adams*, demandant, *Radway*, tenant (c), the Court said that the rule which had been adopted was, that as a writ of right generally sought to disturb a possession which had continued for a length of time, no assistance would be given to the demandant, to enable him to get over any difficulties which might occur to him, and there the Court refused to allow the demandant to quash his own writ of summons. This was not an amendment which could have been allowed of course, for the return day of the writ was originally incorrect, as appears in *Tysen*, dem. *Clarke*, ten. (d), and the leave of the Court ought to have been obtained before the alteration was made. In *Com. Dig.* tit. *Enquest* (e), it is said the want of a good *teste* cannot be amended.

TINDAL, C. J.—This is an application to set aside a writ of summons, and the objection is that after it was issued returnable on the 20th of *April*, the party in the cause, of his own authority altered the writ from the date of the 20th of *April* to the 24th. But looking at the facts of the case, as explained in the affidavits, it appears that this is not altogether a fair statement. The

(a) 1 B. & C. 111.

(b) 7 Bing. 434.

(c) 1 Marsh. 602.

(d) 3 Wilson, 562.

(e) C. 6.

writ, as originally issued, was made returnable on the 20th of *April*, but it was afterwards discovered that this date was incorrect: first, because there was not fifteen days between the *teste* and the return, and secondly, because the Court would not sit on the 20th of *April*, the day upon which the knights were to appear in court. If the officer had been aware of the latter fact, he would not have issued the writ at all, returnable upon the 20th of *April*. Now suppose the mistake had been discovered the moment after the writ was signed at the office, and that the attorney had therefore turned back and altered the writ and re-sealed it, undoubtedly no objection could then have been made. It is true that the writ had been delivered to the sheriff, but nothing had been done upon it, and therefore whilst the writ remained unexecuted the date of the return was altered, and it was taken back to the office and re-sealed, when it was again delivered to the sheriff, and two seals now appear upon it. I cannot, therefore, now look at it except as a good and valid writ. If the other party had sustained any actual injury, then there might be good reasons for assenting to this objection; but here due notice was given to the parties, and no possible injury could accrue to them. The rule must be discharged.

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PARK, J.—I agree entirely, for the alteration of the writ was the judicial act of the Court. In the case of *Adams v. Radway (f)*, which has been cited, the writ was actually executed, but here it was merely in the hands of the sheriff. It has been argued that writs of right ought to be very narrowly watched; but I have heard no authority cited, to shew that we ought not to deal with them as we do with other writs. I think it is very important to notice the delay which has taken place in taking this objection; it was mentioned to the Court on the 24th of *April*, when the knights were sworn in open Court, and this rule was not applied for until the 12th of *May*, eighteen days afterwards. The application ought to have been made before, and if necessary, cause might have been shewn at chambers..

GASELEE, J., and VAUGHAN, J., concurred.

Rule discharged.

(f) 1 Marsh, 602.

MILLER, Demandant, v. MILLER, Tenant.

June 1st.

WRIT of right tried at bar to recover a messuage and premises in *Mid-
dlessex*.

Talfourd, Serjt., and *Busby*, for the demandant; *Bompas*, Serjt., and *W. H. Watson* for the tenant.

The tenant claimed the estate as devisee under the will of *Thomas Miller*, made in 1806. It appeared that the will was duly executed in the presence of three witnesses, named *Kenyon*, *Willis*, and *Campbell*, who were described as clerks to Mr. *Comyn*, the attorney who prepared the will. For the purpose of proving a due search for those witnesses, the attorney for the tenant proved that he had caused the rolls of attorneys to be searched, but did not find the names of either of the witnesses; that he had applied to Mr. *Comyn*, on the 3d of *November*, 1834, for information upon the subject of the will generally, and on the 6th of *May* last, for information about the attesting witnesses, but could hear no tidings of either of them. And that on

What is a sufficient search for witnesses to prove handwriting to allow secondary evidence to be given, must depend on the circumstances of each case, and *vid:* what search was held sufficient.

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the 25th of *May*, he had put an advertisement in four *London* newspapers, desiring the witnesses, if alive, to communicate with him immediately.

Mr. *Comyn* was also examined, and he stated that he had endeavoured to find *Kenyon* and *Campbell*, in the year 1815, being then in want of their testimony, but without success. He had found *Willis*, at that time serving as a clerk in the office of *Swain, Stevens* and Co., in *London*; but he had not seen or heard of *Willis* since that time. Upon cross examination, he said, that he had not informed the tenant's attorney that *Willis* was with *Swain* and Co. in 1815.

It was contended by the counsel for the demandant, that a sufficient search for *Willis* had not been shewn to entitle the tenant to prove the will, by proving the hand-writing of the testator and witnesses.

TINDAL, C. J.—This objection arises upon a will, which is now 29 years old, and if the present action had been deferred until next year, the will would have proved itself, and the attesting witnesses need not have been called. But we are now called upon to consider the objection which has been made, and we must not overlook this principle, that the longer the time has been since the will was executed, the greater are the difficulties which offer themselves when the evidence is sought for. The only question now is this, whether sufficient diligence has been used in making inquiries for the witness, *Willis*, and it seems to me that such inquiries have been made as to induce us to say that we ought to receive this will upon proof of the hand-writing. *Willis* was heard of last in 1815, and he was then a clerk in the office of Messrs. *Swain* and Co., and if this circumstance had ever come to the knowledge of the tenant's attorney, he undoubtedly ought to have gone to Messrs. *Swain* and Co., to prosecute an inquiry after the witness. But it seems that this fact was not communicated, and Mr. *Comyn* states that he did not recollect the circumstance when the application was made to him. It would also appear from the facts which have been stated, that the inclination on the part of the tenant, would be to produce the attesting witnesses if it was possible to do so.

PARK, J.—I am of the same opinion. It was twenty years since the witness had been heard of; what is a sufficient and reasonable search must always have reference to the circumstances of each particular case. I agree that if Mr. *Comyn* had stated that the witness was at Messrs. *Swain's* office, in 1815, it would then be the duty of the attorney to make inquiries there, and if he had not done so, there would have been no colour for saying that a sufficient search had been made.

GASELEE, J.—It seems amongst other inquiries, that the attorney applied for information about *Willis*, to a person who had been contemporary with him in Mr. *Comyn's* office.

VAUGHAN, J.—After the lapse of thirty years, the law presumes that the evidence to prove a will is not attainable. Here we cannot fix upon the party a want of reasonable search for the necessary evidence. He addressed himself to the persons who alone were likely to give him information.

Upon proof of the hand-writing of the testator and witnesses, the will was read in evidence.

HAILEY v. DISNEY.

(Before GASELEE, J.)

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June 16th.

ARNOLD applied for a rule to interplead on behalf of the sheriff, under section 6, of the Interpleader Act (a). The levy being only 12l. 3s. 3d., and this being the last day of term, he asked that the rule might be drawn up to shew cause at chambers.

Under particular circumstances the Court allowed cause to be shewn at Chambers to a sheriff's rule under the Interpleader Act.

GASELEE, J., after consulting the other judges, said, that the application under the 6th section, could not originate before a single judge; but that the rule having once been granted by the Court, cause might be shewn at chambers.

Rule *nisi* accordingly (b).

(a) 1 & 2 Wm. 4, c. 58, sec. 6, directs, That where any claim shall be made to any goods taken in execution, "it shall and may be lawful to and for the Court from which such process issued, upon application of such sheriff or other officer, made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them, by rule of court, as well the party issuing such process as the party making such claim, and thereupon to exer-

cise, for the adjustment of such claims, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the Court."

(b) *Shaw v. Roberts*, 2 Dow. P. C. 25; and *Cook v. Allen*, *ib.* 11, *contra*.

BACON v. CRESSWELL.

May 29th.

ACTION on an attorney's bill, and by consent a verdict was taken for the plaintiff, subject to a reference before the prothonotary; and a third party, who had once been a partner with the plaintiff, consented to become a party to the reference. The parties not being able to agree on the terms of the reference, and the third party refusing to proceed in the arbitration, *Robinson* had obtained a rule *nisi*, calling upon the defendant to shew cause why the order of *Nisi Prius* should not be discharged, and the plaintiff be at liberty to go to trial *de novo*.

Where by order of *Nisi Prius*, a verdict was taken for the plaintiff, subject to an arbitration, which was not entered upon, through the default of a third party, the plaintiff may apply for leave to enter and try the cause *de novo*.

Wordsworth, for the defendant, shewed cause.—The form of the application is wrong; the rule ought to have been for leave to enter a verdict for the plaintiff, and upon the hearing of that rule the Court would have enforced terms upon the parties. In *Woolley v. Kelly* (a), where a verdict was taken for the plaintiff, subject to an arbitration, and the arbitrator refused to proceed, and the defendant declined to appoint another, the Court ordered judgment and execution to issue against the defendant for the damages, unless he would consent to refer the case to some other arbitrator. In *Taylor v. Gregory* (b), under the same circumstances, a similar application was made.

Robinson, contra.—The plaintiff has taken that which is the most fair and usual course, *Payne v. Bailey* (c), *Hall v. Phillips* (d).

(a) 1 B. & C. 68.

(b) 2 Barn. & Ado. 774.

(c) 3 Brod. & Bing. 305.

(d) 9 Bing. 89.

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TINDAL, C. J.—The cases cited for the defendant are not exclusive authorities. The rule may be moulded to suit the justice of the case when the plaintiff applies for leave to try the cause, which I agree is a much more just application than that which it is said he ought to have made.

Rule accordingly.

May 29th.

FLIGHT v. LORD LAKE.

The enrolment of an annuity deed omitted the word "life" in the heading of one of the columns given by the form in the Statute:—*Held*, that this omission did not invalidate the deed.

COVENANT on an annuity deed. *Plea*:—That no memorial of the deed was enrolled pursuant to Stat. 53 Geo. 3, c. 141. At the trial of the cause before *Tindal*, C. J., it appeared that the enrolment of the deed was according to the form given in the above Statute, except that in the column headed in the schedule "Person or persons for whose life or lives the annuity or rent-charge is granted," the heading was, "Person for whose the annuity is granted," the word "*life*" being omitted. It was objected that this omission avoided the deed, but the learned judge overruled the objection. Verdict for the plaintiff.

Maule now moved to set the verdict aside, and to enter a nonsuit. The directions given by the Statute are very simple, and they ought to be minutely observed. The Court will not understand that the word "life" is in the column, for other words might be inserted, which would clearly be insufficient to comply with the provisions of the Statute. For instance, the word "use" might be understood; nor will a party be relieved from the consequences of mere carelessness.

TINDAL, C. J.—The only question is, whether a person of ordinary capacity can by any possibility misunderstand this document as it now stands. Upon referring to it we find a name under the column which is headed "Person for whose the annuity is granted." Now the Statute only refers to annuities granted for lives, or for a term determinable on lives, and by any reasonable intendment, no other word than the word life could be supposed to have been intended. Looking, therefore, at this document, it seems to give every possible information, and no doubt can be raised as to what was meant by the entry. As to the carelessness which is said to be manifested, we must treat such an omission with reasonable compassion.

The other judges concurred.

Rule refused.

DRUMMOND v. PIGOU.

In case for proceeding to outlawry against the plaintiff, the declaration stated that the defendant

falsely and maliciously, and without probable cause, to procure the plaintiff to be declared an outlaw, made an affidavit of debt for 3550*l.*, and that such proceedings were thereupon had that the plaintiff, under the pretence of owing the said sum, was declared an outlaw.

It was in evidence that the plaintiff owed the defendant 3550*l.* on a mortgage, but that a contract to purchase the mortgaged premises in liquidation of the debt had been made by the defendant, but not completed. *Held*, that upon this evidence the plaintiff was not entitled to recover.

TRESPASS on the case.—The declaration stated, that whereas the plaintiff, before and at the time of the proceeding to outlawry, as was thereinafter mentioned, had not done any act or acts whatsoever, nor was in anywise subject or liable to be outlawed at the suit of the defendant; but,

on the contrary, was in great regard, reputation, &c.; yet the defendant, well knowing all the premises, but falsely, wickedly, and maliciously contriving and intending to injure, aggrieve, and oppress the plaintiff, and to bring him into disgrace; and to subject him to divers forfeitures and disabilities, and to put him to great expense, to reverse the said outlawry, *and falsely and maliciously, and without any reasonable or probable cause*, to cause and procure the plaintiff to be declared and adjudged an outlaw, and to impoverish and wholly ruin him; theretofore, to wit, on, &c., made an affidavit of debt before the *Filacer* of the Court of *Common Pleas*; whereby he, the defendant, deposed, that the said plaintiff was then indebted to him, the defendant, as the executor of one *Jemima Pigou*, in the sum of 3,550*l.* and upwards, for principal and interest, due from the plaintiff upon his, the said plaintiff's, covenant, in a certain indenture of release or mortgage; and that such proceedings were thereupon had by the defendant, to wit, on, &c., that he, the plaintiff, upon the prosecution of the defendant, under colour and pretence of owing the said sum of 3,550*l.*, was declared an outlaw; and the plaintiff further says, that the said outlawry was afterwards, to wit, on, &c., duly reversed; and that, by means of the proceeding to outlawry, by the defendant against the said plaintiff, as aforesaid, and the several proceedings had thereon before the same could be reversed, as aforesaid, the plaintiff was greatly injured in his credit, &c., to the plaintiff's damage of 500*l.*

Pleas.—*First*: Not guilty.—*Second*: That the plaintiff, at the time of proceeding to outlawry, was subject and liable to be outlawed at the suit of the said defendant. Issue on both pleas.

At the trial before *Tindal*, C. J., at the *Middlesex* Sittings after *Hilary Term*, the following facts were in evidence:—

In 1826, the plaintiff had mortgaged certain fee-farm rents to the defendant's mother, as a security for money lent; and, in 1829, an agreement was made between the parties, that the fee-farm rents should be purchased by the mortgagee; and an abstract of the title was delivered, and other preliminary steps were taken to complete the purchase; but, difficulties having arisen, it was not completed in 1832, when the mortgagee died, and the defendant became her executor. The proceedings for the arrangement of the purchase, were subsequently carried on between the respective solicitors for the plaintiff and defendant until 1834, when the negotiation was suddenly broken off; and the defendant, without making any application to the plaintiff's attorney, commenced an action for the amount of the mortgage debt; and the plaintiff, who had for some years resided at *Brussels*, not appearing to the process, the defendant proceeded to outlawry against him. In *November*, 1834, the proceedings in the outlawry were set aside, as being, under the circumstances, an abuse of the process of the Court (a). In the course of the trial, an objection was raised, that the proceedings in outlawry, and the reversal, had not been duly proved; but, at the conclusion of the case, the learned judge nonsuited the plaintiff.

F. V. Lee obtained a rule *nisi*, to set aside the nonsuit, and for a new trial.

Taddy, Serjt., and *Talfourd*, Serjt., shewed cause.—The plaintiff failed in proving the proceedings in the outlawry, and the reversal. But it will be

(a) See *Pigou v. Drummond*, 1 Bing. N. S. 354.

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contended, that, under the plea of not guilty, the allegations of the outlawry and reversal are admitted. By *Reg. Hil. T. 4 Wm. 4*, tit. IV., "In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act, alleged to have been committed by the defendant, and not of the facts stated in the inducement." Here the outlawry forms a part of the wrongful act, and goes to the gist of the action; therefore, the plea puts the outlawry in issue: and the plaintiff was bound to shew that the outlawry was reversed, and how reversed, for that would materially affect the evidence of malice, and that of probable cause.—[*Bosanquet, J.—Webb v. Hill (b)* is a strong authority upon that point.]—But *secondly*, the plaintiff did not succeed in establishing his right of action upon the merits. The declaration states, that the plaintiff had not done any act which made him subject to be outlawed, and that was in issue. It was in evidence, that the money was due on the mortgage deed, and the plaintiff was out of this country. It has been held, that an outlawry may be reversed, if the party was abroad when the *exigent* was issued, *Richardson v. Robinson (c)*; *Bryan v. Wagstaff (d)*. But these cases do not shew that the parties had not a right to proceed to outlawry. The defendant is charged with having outlawed the plaintiff falsely and maliciously, and without any reasonable or probable cause; but the evidence shewed that the defendant had proceeded legally in prosecuting the outlawry.

F. V. Lee, contrâ.—The defendant had no right to proceed for the recovery of the mortgage debt, when a sale of the property had been actually made, although it was not completed; nor was the outlawry lawful. The plaintiff was not residing in *England*, and his mere absence would not entitle the defendant to proceed to outlawry. Outlawry is a punishment inflicted by law, for a contempt, in refusing to be amenable to and abide by the justice of that Court which hath lawful authority to call him before them (*e*). And the law distinguishes between outlawries in capital cases, and those of an inferior nature; for, as to outlawries in treason and felony, the law interprets the party's absence sufficient evidence of guilt, but not otherwise. In *Thomby v. Fleetwood (f)*, it is said, it would be contrary to law that persons out of *England* should be outlawed, unless in some particular cases specially provided for; *Hesse v. Wood (g)*. *Secondly*, it is objected that there was no sufficient evidence of the outlawry or reversal; but, admitting the objection to be maintainable, by the plea of not guilty the outlawry and reversal are both admitted. *Jones v. Brown (h)*, which was an action of trespass, where the defendants justified as assignees of a bankrupt, and averred that the goods were the property of the bankrupt; and the plaintiff took issue upon one fact only, namely, the property in the goods; and the Court held, that all the proceedings in bankruptcy were admitted, and need not be proved.

TINDAL, C. J.—This is an action on the case, brought by the plaintiff against the defendant for maliciously, and without any reasonable or probable cause, procuring him to be declared an outlaw. It appeared at the trial,

(b) 1 Moody & Mal. 253.

(c) 7 Taunt. 309.

(d) 8 Dow. & Ry. 208.

(e) Co. Lit. 128; 3 Inst. 161.

(f) 10 Mod. 357.

(g) 4 Taunt. 691.

(h) 1 Hodges, 33.

that the affidavit of debt, in the suit in which the outlawry was sued out, was duly made by the defendant, and that the money was due for principal and interest on the mortgage of certain fee-farm rents. It also appeared that a negotiation for the sale of the fee-farm rents to the defendant had been entered into; but, from some misunderstanding, the arrangement had never been completed. I then thought that the plaintiff was out of Court; that, having averred that the outlawry was sued out without any reasonable or probable cause, he was bound to prove that allegation. A point has been made, that the evidence of the outlawry and reversal was not duly proved at the trial; and the answer set up is this, that, under the plea of not guilty, these averments in the declaration are admitted. I remember that I was much struck with the state of the pleadings at the trial, and was surprised that a traverse had not been taken in the plea: but, upon the whole, I am of opinion that the nonsuit was correct; and this rule must, therefore, be discharged.

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PARK, J.—The plaintiff was bound to prove malice, and want of probable cause: both must concur. Here it was proved, that there was an existing debt at the time the outlawry was prosecuted. It is not necessary to touch the other point; but the defendant ought to have pleaded that the outlawry was not duly reversed.

GASKELL, J.—How is it possible to say, that there was no reasonable or probable cause for the proceedings taken by the defendant? for the mortgage debt was due when the affidavit was made. Upon the point of pleading I agree with the rest of the Court.

BOSANQUET, J.—What was in issue at the trial was, whether the defendant had proceeded without probable cause, and maliciously; and it was necessary to prove both. The declaration states the want of reasonable and probable cause to be the making an affidavit of debt, and taking such proceedings under colour and pretence that the money was owing, that the plaintiff was declared an outlaw; and it was proved at the trial that there was such a debt in existence. As to the other point, I think that under the new rules of pleading, the reversal of the outlawry was not put in issue.

Rule discharged.

GREEN v. GLASBROOKE.

June 12th.

TALFOURD, Serjt., obtained a rule nisi, calling upon the defendant and Messrs. *Dobson* to shew cause why the writ of *fi. fa.* issued in this cause, with the sheriff's return thereto, should not be taken off the file of the court, to be amended.

The affidavits disclosed the following facts:—On the 7th of June, 1832, the plaintiff caused judgment to be entered up against the defendant on a warrant of attorney, and a *fi. fa.* was issued by Messrs. *Dobson*, as the plaintiff's attorneys, directed to the sheriff of *Worcestershire*, and indorsed, to levy

Where the plaintiff's attorney levied an execution on the goods of defendant, and afterwards, against good faith, induced the sheriff to make a false return to the writ of *fi. fa.*

which shewed a larger sum to have been received by the plaintiff than was the fact, the Court ordered the writ to be taken off the file of the court, to be amended.

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450*l.* 15*s.* On this writ the sheriff levied certain growing crops and chattels on a leasehold farm held by the defendant, which was valued at 313*l.*, but the landlord of the farm having claims on the defendant, an arrangement was made, by which only 183*l.* 4*s.* 6*d.* came to the hands of the plaintiff, the remainder of the money being paid to the landlord in liquidation of his demand. In completing this arrangement Messrs. *Dobson* acted as attorneys for the defendant, as well as the plaintiff, and a deed, to which the sheriff, the landlord, and the plaintiff and defendant were parties, was duly executed.

In 1834, the plaintiff having employed another attorney, caused application to be made to Messrs. *Dobson* for the judgment paper and other documents, to enable him to levy the remaining part of the debt; but he did not obtain these documents, although he had procured a judge's order for that purpose.

The plaintiff subsequently brought an action against the defendant to recover the balance due. And on the 25th of *January*, 1835, after the declaration in the action was delivered, Messrs. *Dobson*, who were then acting as attorneys for the defendant in the action, wrote to the under-sheriff of *Worcestershire*, who was in office in 1832, and requested him to indorse the following return on the writ of *fi. fa.*: "That he had caused goods to the value of 313*l.* to be levied, which sum was paid or fully accounted for to the said *James Green*, deducting poundage, &c." This return having been made, Messrs. *Dobson* caused it to be filed and entered on the roll.

Taddy, Serjt., shewed cause.—This should have been a proceeding against the sheriff for making a false return to the writ of *fi. fa.* If the Court should now decide upon this application, the interest of the defendant will suffer, who might not be bound by the arrangement which was made with the landlord and the plaintiff.

Bompas, Serjt., *contrd.*—It is quite clear upon the statement of facts in the affidavits, that the writ ought only to be indorsed for the sum of 183*l.* 4*s.* 6*d.*, which was the amount actually received by the plaintiff in part satisfaction of his debt. If the return is allowed to remain, it will prevent the plaintiff from recovering the money which is due to him in the action which is now pending.

Per Curiam.—This is not a false return made by the sheriff, but it is a return procured to be made against good faith and equity. It is perfectly clear that Messrs. *Dobson* ought to have obeyed the judge's order, and to have delivered up all the documents in their possession; but instead of doing this, they obtain a return to the writ against the merits of the case, in favour of their own client. The rule must be made absolute.

Rule absolute with costs against the *Dobsons*.

Ex parte LORD.

Com. Pleas.

May. 30th.

GODSON had obtained a rule against an attorney, calling upon him to answer affidavits, which charged him with misconduct in the prosecution of certain actions. *W. H. Watson* shewed cause; but it appeared that the affidavit on which the rule was granted did not shew that the party against whom the application was made was an attorney of this court, or that any of the actions had been brought there.

If a rule is obtained against an attorney, it must appear upon the affidavits that he is an attorney of the court.

Godson.—The Court will take judicial notice that a party is on the rolls of the court.

Per Curiam.—Those who bring heavy charges against attorneys should be regular in their own proceedings. If we should hear this motion, and make the rule absolute, it may turn out that we have no jurisdiction. That the party is an attorney of this court ought to appear by affidavits.

Rule discharged with costs (a).

(a) *Esparis Hoare*, 1 Harr. & Woll. 211, *contra*.

INNES v. LEVI.

June 16th.

DEBT against the defendant, a sheriff's officer, to recover a penalty under Stat. 32 Geo. 2, c. 28, for having taken a greater sum than was by law allowed, on arresting the plaintiff. At the trial it was in evidence, that the defendant had arrested the plaintiff within three miles of the sheriff's office, and had demanded and received a guinea from him before he was discharged, on giving bail to the sheriff. Mr. *Bunce*, one of the assistant Masters of the *King's Bench*, proved that the caption fee allowed on taxation between party and party was half-a-guinea, if the party was arrested within three miles from the sheriff's office; and one guinea, when arrested beyond that distance (a). The jury found a verdict for the penalty of 50*l*.

A sheriff's officer is liable to the penalty for taking a greater sum on an arrest than is by law allowed (see 32 G. 2, c. 28), when he receives more than the caption fee allowed on taxation of costs between party and party.

Bompas, Serjt., now moved for a nonsuit or a new trial.—The fee which was proved to be allowed by Mr. *Bunce*, is the fee which is paid by the plaintiffs in the cause, to the officer.—[*Tindal*, C. J.—Is it not the caption fee which is referred to by the Statute?]
—No; it refers to a fee which is supposed to be payable by the defendant to the officer, and it is quite a distinct payment. In *Martin v. Slade* (b), it was proved that a guinea was always allowed by the prothonotaries in the taxation of costs; and in *Martin v. Bell* (c), the allowance of the officer is said to be *prima facie* evidence of what is allowed by law. If the defendant's attorney paid a guinea to the officer, he would be allowed that sum on taxing his costs.—[*Park*, J.—*Boldero v. Mosse* (d) is an authority against your application.]—[*Bosanquet*, J.—In *Martin v. Bell*, it was the plaintiff's attorney who stated what the allowance was.]

(a) It was suggested that Mr. *Bunce* said on his cross-examination that he had often known a fee paid to the officer allowed to a defendant's attorney on taxation.

(b) 2 New R. 59.
(c) 6 M. & S. 224.
(d) 3 T. R. 417.

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On a subsequent day the Court refused the rule for a nonsuit, and said that the law was settled by the cases cited, and by *Dew v. Parsons* (e), and *Foster v. Blakelock* (f). On other grounds a rule nisi for a new trial was granted.

Rule accordingly.

(e) 2 B. & Ald. 566.

(f) 5 B. & Cress. 328.

June 12th.

BECKE v. MORDAUNT.

Where a judgment was set aside on payment of costs, and an affidavit of merits, with leave to plead *de novo*, the Court refused to allow defendant to plead that the plaintiff, an attorney, had not delivered a signed bill of costs in pursuance of the Statute, that not being a plea to the merits.

ACTION to recover an attorney's bill of costs.—The defendant, by leave of a Judge, pleaded four pleas; one of which was, that no signed bill had been delivered, in pursuance of the Statute. The pleas were delivered; but, in consequence of an irregularity in their delivery, the plaintiff signed judgment. The defendant then applied to set aside the judgment, which application was granted, on payment of costs, and an affidavit of merits. The same pleas were again pleaded, and the plaintiff then took out a summons before *Park, J.*, to strike out the plea that no bill had been delivered, as not being a plea to the merits; and the learned Judge ordered the plea to be struck out.

W. H. Watson having obtained a rule nisi, to set aside this order,

Stephen, Serjt., and *Waddington*, shewed cause.—This is not a plea to the merits, which is decided by *Holmes v. Grant* (a).

Watson.—If a signed bill had been duly delivered, the defendant might have taxed the bill, and saved the expense of this action; therefore, the plea is a plea to the merits.

Per Curiam.—It is quite clear that this is not a plea which goes to the merits of the cause; and after the defendant was allowed to plead *de novo* upon an affidavit of merits, it ought not to have been put upon the record.

Rule discharged (b).

(a) 1 Gale, 59.

(b) It was discussed but not decided, whether the objection that no bill was delivered, could have been taken by a defendant under the plea of *non assumpsit*. *Watson* said, that in *Moore v. Dent*, which was an action on an attorney's bill, tried at *Durham*,

before *Parke, B.*, it had been held, that where *non assumpsit* only was pleaded, the plaintiff need not prove the delivery of a signed bill. *Park, J.*, said, that the inclination of his opinion was the other way. See *Barnett v. Glossop*, ante, 94; *Potts v. Sparrow*, ante, 135.

June 10th.

TWYNING, Demandant, v. LOWNDES, Tenant.

In a writ of right the tenant may withdraw a demurrer to the demandant's count.

DEMURRER to demandant's count. *R. V. Richards* supported the demurrer upon the authority of *Dumsday*, dem. v. *Hughes*, ten. (a); but the Court intimating an opinion that the cases were not precisely similar, *Richards* said he would withdraw the demurrer.

Per Curiam.—The Courts will not allow amendments in writs of right in

(a) 3 Bos. & P. 353.

favour of demandants. In *Charlwood v. Morgan* (b), the Court would not allow the demandant to amend a mere mistake in his count, upon the ground that the prosecution of writs of right ought not to be encouraged; but this is the converse of that case, and the same reason does not apply to prevent us from granting a favour to the tenant who is in possession of the estate. The demurrer may be withdrawn.

Demurrer withdrawn.

(b) 1 N. R. 64; see also *Adams v. Radway*, 1 Marsh, 602.

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ARDEN and an' v. GARRY.

June 16th.

HUMFREY had obtained a rule nisi to set aside a writ of summons for irregularity in the indorsement of the name of the attorneys who sued out the writ. The indorsement was, "This writ was issued in person by J. Arden and R. C. Arden, who reside at No. 2, Clifford's Inn-passage, Fleet-street, in the city of London." The affidavit shewed that Clifford's Inn-passage was in the parish of St. Dunstan, in the city of London.

"No. 2, Clifford's Inn-passage, Fleet-street, in the city of London," is a sufficient indorsement of the attorney's residence on a writ of summons: the parish need not be named, 2 Wm. 4, c. 39, s. 12.

Talfourd, Serjt., shewed cause.—In *King v. Monkhouse* (a) it was held, that Grays' Inn-square, London, was a sufficient indorsement, although it was shewn that Gray's Inn was not in London.

Humfrey, contra.—Gray's Inn is extra-parochial, and therefore the name of the parish could not be given. The Stat. 2 Wm. 4, c. 39, sec. 12, requires that when the writ is sued out in person, there shall be a memorandum "mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be;" and the form in *Schedule 2*, to the act, is to the like effect. Here the parish is not stated.

Per Curiam.—No person could doubt about this description. If we saw any design to mislead the defendant, we might interfere, but nothing of that kind appears.

Rule discharged with costs.

(a) 2 Dow. P. C. 221.

SYKES and o^r v. HAGUE.

May 23d.

TOMLINSON moved for an attachment for non-performance of an award, which directed that the defendant should deliver up to the plaintiffs a certain bond upon request. The affidavit shewed a demand made by one of the plaintiffs.

An award directed that a bond should be delivered up to the plaintiffs upon demand:—Held, that a demand made by one plaintiff, without a power of attorney from the others, was an insufficient demand to obtain an attachment.

Per Curiam.—The award does not say that the bond shall be delivered up to the plaintiffs, or to one of them. You should have a power of attorney from the other plaintiffs, authorizing the demand to be made by one of them.

Rule refused.

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June 8th.

HEATH, Esq. v. MILWARD.

In trespass the declaration stated that the defendant broke and entered a "certain close of the plaintiff," and the defendant pleaded that the close was not the plaintiff's close.—*Held*, that the possession, and not the ownership of the close, was in issue.

TRESPASS. The declaration stated, that the defendant broke and entered a certain close of the plaintiff, situate and being in the county of *Surrey*, abutting towards the east on a certain close in the possession of the plaintiff, towards the west on a certain highway (to wit), a highway leading to *Leith Hill*, towards the north on a certain other close in the possession of the plaintiff, and towards the south on a certain other close in the possession of the plaintiff, and there destroyed and spoiled the grass and herbage of the plaintiff, there and then growing and being, and also then felled, cut down, trimmed, prostrated, and destroyed divers bushes, trees, and hedges of the plaintiff, then and there growing and being, and carried away the same, and then ejected, expelled, put out, and removed the plaintiff from the said close, to plaintiff's damage of 100*l*.

Pleas.—*First*, Not guilty.—*Second*, That the said close in which, &c., was not at the said times when, &c., the close of the plaintiff, nor were the said grass and herbage, bushes, trees, and hedges, the grass, &c. of the plaintiff in manner and form as the plaintiff had above alleged.—*Third plea*, That the said close in which, &c., now is, and at the said several times when, &c., was the close, soil, and freehold of the defendant, wherefore the defendant committed the said several supposed trespasses in the said close in which, &c., so being the close, soil, and freehold of the said defendant, as he lawfully might, for the cause aforesaid, &c.

By the *Replication*, the plaintiff took issue on the two first pleas, and traversed the third, whereupon issue was also joined.

At the trial, before *Denman*, C. J., at the Spring Assizes for *Surrey*, it appeared that the land in question was on the waste of a manor, but the plaintiff proved that he had exercised acts of ownership upon it. The learned judge directed the jury, that upon the second issue the plaintiff was bound to prove that the close was his own property. The jury found a special verdict; that they did not know to whom the land belonged; and the verdict was therefore entered for the plaintiff upon the first and third issues, and for the defendant upon the second issue, with leave reserved to the plaintiff to apply to the Court to enter a verdict for him upon that issue also.

Channell obtained a rule *nisi* accordingly, upon the ground that the second plea only put the plaintiff's possession of the close in issue, and that having proved his possession, he was entitled to have that issue found in his favour.

Andrews, Serjt., and *Petersdorff*, shewed cause.—The plaintiff states in his declaration, that the defendant "broke and entered a certain close of the plaintiff," which statement amounts to this, that the plaintiff was owner of the close; and the second plea traverses the ownership as well as the possession, therefore the plaintiff was bound to give evidence of ownership.—[*Tindal*, C. J.—Mere possession of the close would be sufficient to support the action.]—The plea was intended to traverse the allegation in the declaration, which is all that can be done under the new rule of pleading, and no

new matter can be introduced (a). The word close, in its more extensive sense, includes an idea of the property in the land, *Save's* case (b). In *Samuel v. Morris* (c), in an action of trover, the plea was, that the goods were not the property of the plaintiff in manner and form as in the declaration alleged; and it was held, that the question of the right of possession, as well as the right of property, was therefore raised.

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Thesiger and *Channell*, *contra*, were stopped by the Court.

TINDAL, C. J.—I think the second plea was intended to deny the plaintiff's possession of the close. The word close may, under some particular circumstances, include the idea of interest as well as of possession; but *sermones semper accipiendi sunt secundum subjectam materiam*. Mere possession would entitle the plaintiff to maintain this action, and why should we hold that the plaintiff used the word to describe more than his possession of the piece of ground on which the trespass was committed? or why should we extend the meaning of the same word when used by the defendant in the second plea, where he says, that the said close was not at the said time the close of the plaintiff. That the defendant well knows how to state a claim of ownership of the close, is evident from the language of the third plea, where he says, that "it was his close, soil, and freehold." It is contended, that by the new rule in trespass (d), a defendant would not be allowed to state new matter in his plea, but that he can only traverse the averment in the declaration; but I see no objection that the plea should state that the plaintiff had no right to the possession of the close.

PARK, J.—The word close may sometimes be employed to imply a degree of interest in it; but here we find the word used by the defendant, first in one sense and then in the other, and when he means to aver ownership, he says, it was his close, soil, and freehold. We must therefore suppose that he intended to use it in the limited sense in the second plea.

VAUGHAN, J., and GASHLEE, J., concurred.

Rule absolute.

(a) Hil. T. Wm. 4, tit. "Trespass," No. 2, "In actions of trespass, *quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the plea mentioned, but not as a denial of the plaintiff's

possession, or right of possession, of that place, which, if intended to be denied, must be traversed specially."

(b) 11 Co. 55, a.

(c) 6 Car. & P. 680.

(d) Hil. T. 4 Wm. 4, No. 2.

GREEN v. BEESLEY.

June 9th.

DEMURRER. The declaration stated, for that whereas, heretofore, &c. It was agreed between the plaintiff and the defendant as follows:—The plaintiff agreed to horse (that is to say, convey by horse and cart) the mail from *Northampton* to *Brackley*, and back again from the latter place to *Northampton*, punctually, and within the time as near as might be provided

The plaintiff agreed to horse a mail at 9l. per mile per annum, and the defendant agreed to pay him the same.

and it was further agreed that all money received for the carriage of parcels should be divided equally between the plaintiff and defendant, and that all losses caused by the loss of parcels should be borne in equal portions:—*Held*, that this amounted to a partnership, and that no action could be maintained at law to recover the payment of the 9l. per mile, or a moiety of the money received for the carriage of parcels.

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for such performance, for and after the rate of 9*l.* sterling *per mile per annum*, and the defendant agreed to pay, or cause to be paid, unto the plaintiff, the said sum of 9*l.* *per mile per annum*, (ratable) the same to be paid at the expiration of each quarter of a year, from the commencement of the said agreement: Provided always that the agreement in that and every subsequent article should be punctually and properly fulfilled. And it was further agreed, on the part of the plaintiff, to pay for one cart then in use for the above purpose, the sum of 18*l.*, the same to be paid into the hands of the defendant forthwith; and the plaintiff further agreed to pay for, in a fair proportion with the defendant, all repairs for replacing of carts, so long as that agreement should be in force; and it was also agreed, that the moneys received for the conveyance of all packages and parcels should be fairly and equally divided between the two parties, the same bearing an equal portion of the loss, if any, occasioned by the loss or damage of such or any such packages or parcels. And it was further agreed, that one quarter's notice should be required and given by either party desirous of discontinuing the said agreement, before either should be absolved from his or their agreement.

After an averment of performance of the conditions, the following *breaches* were set out. *First*, that the defendant had not paid, or caused to be paid unto the plaintiff, the said sum of 9*l.* *per mile per annum*, ratable, at the expiration of each quarter of a year from the time of the commencement of the said agreement; and that there was due and owing from the defendant to the plaintiff, for the conveyance of the said mail from *Northampton* aforesaid to *Brackley*, and back again from the latter place to *Northampton*, the sum of 180*l.* for four quarterly payments of the said sum of 9*l.* *per mile per annum*, ratable, as in the said agreement was mentioned.

Second breach—That the defendant had not, since the making of the said agreement, fairly and equally divided between himself, the defendant and the plaintiff, the moneys received by the defendant, his agents and servants, for the conveyance of packages and parcels, after deducting an equal portion of losses occasioned by the loss or damage of any such packages and parcels, but had wholly neglected and refused so to do. The declaration then averred a refusal to account, and that certain sums were due to the plaintiff. *Demurrer* and *joinder* in demurrer.

S. B. Harrison, in support of the demurrer.—This is an open partnership transaction, with a participation in profit and losses. It does not even appear that any accounts had been rendered between the parties. All the cases shew that in such a case as this no action at law can be maintained. Where there was an agreement between the owner of a lighter and a lighterman, that the latter should work the lighter, and that the net profit should be equally divided, it was held that there was a partnership between the parties; *Dry v. Boswell (a)*.—[*Tindal*, C. J.—Is not this a bill in equity in the shape of a declaration?]

Harrison was stopped by the Court.

Merewether, Serjt., *contra*.—Two breaches are stated in the declaration.

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The first, for the non-payment of four quarterly payments of the milage money, and the second for not dividing the money received by the defendant for the carriage of goods. The first clause of the agreement, to horse the mail at 9*l.* per mile per annum, does not raise a partnership between the parties; and that part of the agreement may at least be enforced, *reddendo singula singulis*. But if the agreement is altogether a mode of paying the plaintiff for his labour, it is not a partnership. In *Wish v. Small* (b), the plaintiff purchased two bullocks, and put them to depasture on the lands of another, it being agreed that the profit upon the re-sale of the bullocks should be divided between the plaintiff and the owner of the lands; and it was held that this did not amount to a partnership, but was merely a mode of paying for the pasture. In *Mair v. Glennie* (c), it was contended that the captain of a ship was a partner, because the amount of his wages depended upon the value of the cargo he might obtain; but Lord *Ellenborough* said, "There is no pretence for saying that the captain was a partner, because his wages were to be regulated and paid by reference to a calculation on the profits of the adventure." In *Hesketh v. Blanchard* (d), certain goods were shipped upon an adventure by one person, and another party was to have half the profit, if any should be made; and it was held that as between themselves there was no partnership, but only so much given as a compensation for trouble.

TINDAL, C. J.—In this case two breaches are alleged in the declaration; the first for the non-payment of four quarterly payments for horsing the mail from *Northampton* to *Brackley*, and back again; and the second for not dividing the money received for the conveyance of goods after deducting an equal portion of losses. It appears to me, with respect to the first breach, that the plaintiff could have recovered upon that, if it had not been connected with the other clauses in the agreement; but it is impossible not to see that the understanding between the parties was, that the 9*l.* per mile per annum should not be paid absolutely, but should be merely an item in the accounts which were to be kept between them. The defendant was not to pay this sum to the plaintiff, and afterwards receive from the plaintiff the half of any losses which might have occurred, but he was to be paid conditionally, for the subsequent part of the agreement is engrafted with the former part, and the parties are thereby made partners in the profit and losses of the concern. In the first place, the money received by the defendant for carriage is to be divided, which amounts to an agreement to share the profits; and secondly, the losses arising from the loss or damage of the parcels is also to be borne equally, which makes them participators in the losses; and it is a participation in profit and loss which makes a partnership. Therefore, the plaintiff and defendant being partners, and the 9*l.* per mile being payable only on the conditions stated in the other parts of the agreement, the first part of it is drawn down and incorporated with the latter parts, and the action on the first breach cannot be sustained. Nor can the action on the second, which is clearly not sustainable.

PARK, J — The question is, was there a partnership between these parties? Here is an agreement to share in profits and losses, expressed in the

(b) Note to *Dry v. Boswell*, 1 Camp. 330.

(d) 4 East, 144.

(c) 4 M. & S. 240.

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strongest terms, and that constitutes a partnership. It has been ingeniously argued that the first breach of the agreement may be the subject of an action at law, but the proviso which immediately follows the agreement to pay the 9*l.* per mile, draws that part of it down and incorporates it with the other part, which shews that there was to be a partnership between the parties. In *Fremont v. Coupland* (e), where the plaintiff and defendant had been engaged in running a coach, and they divided the profits, it was held to be a partnership; and although weekly accounts were furnished, the action was held not to be maintainable, as no final balance had been struck.

GASELEE, J. concurred.

BOSANQUET, J.—This is an agreement to carry on the business in partnership; the profits and losses to be divided equally. The first breach of the agreement is for the benefit of the plaintiff; but that is made by the proviso, to be subject to the subsequent articles which are inserted.

Judgment for the defendant.

(e) 2 Bing. 170; S. C. 9 Moore, 319.

June 16th

Ex parte QUICKE and o^r

1. Where a vendor's attorney disclosed outstanding terms upon an abstract, although a marketable title might have been shewn by taking it up at a subsequent date:—*Held*, that upon taxation of the attorney's costs, he was entitled to be paid his charges incurred in getting in the outstanding terms.

2. But the attorney will not be allowed his charges for attested copies of a will, which by the conditions of sale were to be given at the vendor's expense, such a condition being unusual.

AN order had been obtained by a vendor to tax the bill of costs of his attorneys, incurred in making a title to certain property which had been sold by auction. When the parties appeared before the prothonotary, the vendor objected to certain charges made for furnishing an abstract of the title, and for attested copies of a will. The disputed charges were disallowed *pro forma*, and a rule was obtained to review the taxation, when the prothonotary delivered the following statement to the Court:—

The following is a short abstract of a title to an estate at *A.*

1737, a conveyance in fee, and a deed assigning terms to attend the inheritance.

These terms being satisfied, were never afterwards questioned or dealt with.

Subsequently the property came into the possession of *A. B.*, who by her will, dated in 1773, devised it, and through which will the vendor held the property.

A. B. had possessed the property several years, and her possession could be shewn by leases granted by her as far back as 1761.

In 1832, the owner wishing to dispose of this property, instructed his solicitor to prepare abstracts for the purchasers.

The abstracts so prepared commenced with the early deeds of 1737 shewing some outstanding terms, in consequence of which assignments were called for at considerable expense to the vendor.

In the conditions of the sale prepared by the same solicitor, the following clause was inserted:—"That the respective purchasers shall be satisfied with an attested copy of the probate of the will of the late *J. Q.*, deceased (the father of the said vendor), which, when required, shall be furnished to them at the costs of the said vendor; but if the said respective purchasers shall require an office copy of such will, such

office copy shall be furnished to them at his, her, or their, respective expense."

The sale must be supposed to take place between the 1st of *January* and the 1st of *July*, 1832, previous to the 3 and 4 *Wm.* 4, c. 27. The solicitor's bill being referred to the prothonotary to be taxed, upon these facts, he decided—*First*, That the abstract might, in strictness, commence with the deeds in 1737, yet that the solicitor ought to have inserted a clause in the conditions of sale, stipulating that the assignment of terms, letters of administration, &c., if required, should be at the expense of the purchaser (*a*). The prothonotary has therefore disallowed the costs and expenses incurred on account of such assignment of terms, &c. *Secondly*, That as the condition to furnish each party with an attested copy of the probate of the will of *J. Q.* was superfluous and unnecessary, the prothonotary has disallowed the expenses of furnishing such attested copies.

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Merewether, Serjt., for the vendor.—If the abstract of the title had commenced with the will of 1761, a good marketable title would have been shewn. The deed of 1737 need not have appeared upon the abstract, and if it had not, the expense of procuring assignments of the outstanding terms would not have been incurred by the vendor. The effect of giving an abstract of such an unnecessary length, is to put costs into the pocket of the vendor's attorney.—[*Tindal*, C. J.—If it appeared that this was done merely to make the abstract longer, we should know how to deal with it.]—As to the second point, the clause in the conditions, which stipulated that the vendor should deliver at his expense an attested copy of the will of *J. Q.*, is quite unusual.

Talfourd, Serjt., *contrd.*—This is not a question between adverse parties, but between a vendor and his solicitor. The deed of 1737, was in the possession of the vendor, and it was the duty of the solicitor to disclose it, or he might have rendered himself liable to an action at the suit of a purchaser. The stipulation to furnish copies of the will of *J. Q.*, rendered it unnecessary to insert a copious extract of it in the abstract, which must otherwise have been done.

TINDAL, C. J.—It is certainly a matter of prudence to begin no further

(*a*) The opinions of three eminent conveyancers were taken upon a statement similar to the above, whilst the matter was discussed before the prothonotary. As these opinions may be useful in practice, copies of them are given.

Opinion 1.—"Except under a special contract, the abstract ought to commence with the deeds 1737. The vendors might stipulate that no assignment of the terms shall be required, and that the purchaser shall be at the expense of the assignment, and of the means of qualifying proper persons to assign the terms, if letters of administration, &c., should be necessary."—*P.*

Opinion 2.—"I think the abstract should commence with the leases of 1761, shewing *A. B.*'s possession of the property. These should be followed by her will in 1773, and the subsequent devolution of title. I hold

that a purchaser could not insist on an earlier title. But when a title has been deduced in this way, I have known a purchaser cause a fine to be levied, and recovery suffered, to guard against latent settlements, of course at his own expense, because it is on a purchaser taking an objection to title, to prove that it is real and not imaginary."—*H.*

Opinion 3.—"I am of opinion that the title commencing with the will (which will, and the subsequent instruments, I conclude lead to the inference that *A. B.* was seised in fee) would be a sufficient title (the possession being shewn by leases), and that a purchaser could not require an earlier title. If required it must be disclosed without prejudice to the vendor's right to insist that the terms are surrendered, which I think would be presumed."—*W.*

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back with a title than is absolutely necessary; but I am not prepared to draw the line too tightly in considering such a case as this. Here the purchaser might have been turned round by a title perfected by the assignment of these outstanding terms; and if this had happened, an action for damages might have been brought against the attorney. If these assignments had been required by the purchaser, the vendor must have furnished them to perfect the title, and a prudent conveyancer would have inquired whether any such outstanding terms were in existence. Therefore, under these circumstances, we should be doing an injustice if we did not allow these charges. Upon the other point, I think the clause in the condition of sale is unusual, and the charges for the attested copies must be disallowed.

GASELEE, J.—It is a common practice for conveyancers to request that all outstanding terms may be brought in.

The other judges concurred.

Rule accordingly.

June 6th.

HOCKER v. TOWNSEND.

Before a *distringas* will be granted to compel an appearance, it must be positively sworn that the defendant has not appeared.

TURNER applied for a *distringas* to compel an appearance under Stat. 2. Wm. 4, c. 29, s. 3 (a). The affidavit stated that the defendant had not entered any appearance to the action "to the best of the deponent's knowledge, information, and belief."

Per Curiam.—The deponent's belief is not sufficient: the affidavit must state a recent search made at the office, and that no appearance is entered.

Application refused.

(a) By sec. 3, in case it shall appear by affidavit to the satisfaction of the Court, that any defendant has not been personally served with a writ of summons, "and has

not, according to the exigency thereof, appeared to the action, &c." then a *distringas* may be ordered.

June 6th.

COLLIS v. LEE.

Where two parties claim to be entitled to a reward, the defendant when sued by one of them to recover it, is not entitled to the relief given by the Interpleader Act, 1 & 2 W. 4, c. 58.

GUNNING applied for a rule under sec. 1, of the Interpleader Act, 1 & 2 Wm. 4, c. 58. The defendant had offered a reward of 10*l.* for the discovery and conviction of persons who had stolen his sheep. A conviction having taken place, this action was brought by the plaintiff to recover the reward, but a third party also claimed to be entitled, and had given notice of his claim to the defendant.

Per Curiam.—The Statute does not apply to such a case as this. Neither of these parties might be entitled to the reward. It is not like a case where one of the parties must be entitled to succeed.

Rule refused.

LAMBIRTH v. BARRINGTON.

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June 13th.

AN issue had been directed to be tried under the Interpleader Act, 1 & 2 Wm. 4, c. 58, upon the application of the Sheriff of *Essex*, who had seized certain goods under a writ of *fi. fa.* The rule of court which directed the issue, was of *Trinity Term*, 1834, and it was tried at the following Summer Assizes, for *Essex*. A verdict was found for the plaintiff generally, without any mention of costs.

By a rule of court made the 22d of *November*, 1834, the costs of the issue were ordered to be taxed, and it was further ordered that the defendant should pay such costs to the plaintiff. On the 25th of *November* following, before the costs were taxed, the defendant died.

Where the defendant in an issue tried under the Interpleader Act, died after verdict for the plaintiff, but before the judgment was signed, the Court will not order the rules of court to be entered *nunc pro tunc* (1 & 2 Wm. 4, c. 58, sec. 7.)

Spankie, Serjt., obtained a rule *nisi*, in *Hilary Term*, 1834 (*a*), calling upon the executors or representatives of the defendant to shew cause why the plaintiff in the issue should not be at liberty to sign and enter up final judgment upon the verdict *nunc pro tunc*, or why the said executors or representatives should not pay the taxed costs of the issue, or why the plaintiff should not be at liberty to enter on record, pursuant to the Statute, the rules of court made in the cause, as of the 22d of *November*, 1834, *nunc pro tunc*.

Bere shewed cause.—The *seventh* section of the Interpleader Act (*b*) directs that all matters done in pursuance of the act shall be entered of record, with a note in the margin expressing *the true date of such entry*, and every such rule so entered shall have the force and effect of a judgment to secure and enforce the payment of costs directed by any order. Therefore, it is not in the power of the Court to permit the rules of court to be entered *nunc pro tunc*; for the entry can only have the effect of a judgment from the date in the margin.—[*Tindal*, C. J.—The justice of the case calls loudly for the interference of the Court.]—By *Reg. Hil. T. 4 Wm. 4*, the doctrine of relation in judgments, is taken away (*c*), and the effect of granting this application would be to give greater effect to this judgment than is allowed by the positive rules of law. Here the parties have proceeded according to the common

(a) The rule had been enlarged from term to term.

(b) By 1 & 2 Wm. 4, c. 58, sec. 7, "All rules, orders, matters, and decisions to be made and done in pursuance of this act, except only the affidavits to be filed, may, together with the declaration in the cause (if any), be entered of record, with a note in the margin, expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order, and every such rule or order so entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, or hereditaments; and in case any costs shall not be paid within fifteen days after notice of the taxation, and amount thereof, given to the

party ordered to pay the same, his agent or attorney, execution may issue for the same by *feri facias* or *capias ad satisfaciendum*, adapted to the case, together with the costs of such entry, and of the execution, if by *feri facias*; and such writ and writs may bear *teste* on the day of issuing the same, whether in term or vacation; and the sheriff or other officer executing any such writ shall be entitled to the same fees, and no more, as upon any similar writ grounded upon a judgment of the Court."

(c) *Reg. Hil. T. 4 Wm. 4*, c. 3, "All judgments, whether interlocutory or final, shall be entered of record, of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day."

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course of law, and the Court cannot interfere, *Bates v. Lockwood* (d). The Court will not interfere except in cases where the judgment could not be entered up in consequence of the delay of the Court; as where a party dies after a verdict, pending a motion in arrest of judgment, or for a new trial, or whilst the judgment on a special verdict is pending.

Spankie, Serjt., *contra*.—By the *sixth* section of the Interpleader Act, the costs of all proceedings under the act are in the discretion of the Court. If this case is not within the Statute 17 *Car.* 2, c. 8, it ought, by analogy, to be treated as if it was within that Statute. If judgment had been signed, without doubt the costs might have been recovered against the defendant's representatives by *scire facias*.

TINDAL, C. J.—I feel great difficulty in coming to the conclusion, that under the seventh section of the Interpleader Act, we have any authority to order the rules of court to be entered *nunc pro tunc*; because I find in that section that all orders shall be entered of record, with a note in the margin, expressing the true date of the entry, and if we were now to permit them to be entered *nunc pro tunc*, the true date would not be expressed. The case certainly bears a considerable analogy with the Statute of *Car.* 2; by which it is enacted, that error shall not be assigned after the death of a party, if the judgment be entered up within two terms after the verdict; but still it is only an analogy; and on the other hand we find the express directions of the legislature as to the entries of these rules. I give no opinion whether the plaintiff in the issue is not entitled to treat this as an ordinary issue at common law, and to enter up judgment accordingly. This rule must be discharged.

The other judges concurred.

Rule discharged.

(d) 1 T. R. 638.

HUBER v. STEINER.

1. By the French law of prescription relating to bills of exchange, the debt is not extinguished, but the remedy only is taken away.

2. When a personal contract made in a foreign country is sought to be enforced, so much of the law as affects the rights and merits of the contract is adopted from the foreign country, and all which affects the remedy is taken from the *lex fori* of the country where the action is brought.

THE declaration stated, that the defendant, on the 12th day of May, 1813, in parts beyond the seas, that is to say, at *Mulhausen*, to wit, at *London*, made his promissory note, and thereby promised to pay to the order of plaintiff, the sum of 5,800 *livres tournois* value in account, on the 10th day of May, 1817, payable at the house of Messrs. *Steiner, Brothers*, at *Strasbourg*, to wit, at *London* aforesaid.—[The declaration then averred that the note had been duly presented for payment, but that the amount remained unpaid, &c.]

Pleas: First, The general issue.

Second—The English Statute of Limitations.

Third—For that at the time of the making the said promissory note, the plaintiff, and also the defendant, were merchants and traders, domiciled and living and carrying on business in a foreign country, that is to say, the kingdom of *France*; and were subjects of *France*, and subject to the laws of *France*; that the said promissory note was made and delivered within the said kingdom of *France*, by the defendant to the plaintiff; and that by the

law of *France*, then and continually from thence subsisting, all actions upon the said promissory note, are and were wholly barred, precluded, and estopped after five years, from the date of the protest on the said promissory note; and the defendant averred, that five years from the date of the protest had long elapsed before the commencement of that suit. *Conclusion* with a verification.

Fourth—The fourth plea was similar to the third (*a*), except that the statement of the French law was qualified by the following additional averment: "Provided, nevertheless, that the alleged debtor is compellable, if so required, to make oath that he is no longer indebted; and the defendant further saith, that five years from the date of the protest of the said promissory note, had long elapsed before the commencement of that suit; and the defendant averred that he had been, and was ready and willing, from the expiration of the said period of five years, to make oath that he is not indebted upon the said promissory note." *Conclusion*, with a verification.

Replication to the *first* plea, *Similiter*. To the *second* plea—That at the time when the said cause of action in the said declaration mentioned, accrued, the said plaintiff was in parts beyond the seas, to wit, at *Diesenhoffen*, in the canton of *Hungen*, in *Switzerland*; and that the plaintiff, ever since the accruing of the said cause of action, had been, and still was in parts beyond the seas, out of this kingdom, to wit, &c. *Conclusion*, with a verification.

Replication to the *third* and *fourth* pleas, That by the law of *France*, at the time of making the said promissory note, and continually from thence, all actions upon the said promissory note were not wholly barred, precluded, and estopped after five years from the date of the respective protests on the said promissory note, in manner and form, &c. *Conclusion* to the country.

Rejoinder to the *replication* to the *second* plea:—That the plaintiff, after the accruing of the said cause of action, and more than six years before the commencement of the suit, to wit, &c., came from beyond the seas, and was in this kingdom, to wit, at *London* aforesaid, and issue thereon. To the *replication* to the *third* and *fourth* pleas, *similiter*, and issue thereon.

The cause was tried before *Vaughan*, J., at the *London* Sitings after *Easter Term*. The facts of the case are fully stated in the judgment. The jury found a verdict for the defendant, subject to leave reserved to make an application to the Court; but under the direction of the learned judge, the jury found that the parties were domiciled in *France* when the note was made, and they found for the plaintiff on the issue raised upon the second plea.

Taddy, Serjt., having obtained a rule *nisi*, calling upon the defendant to shew cause why the verdict should not be set aside, and a verdict be entered for the plaintiff, or why judgment should not be entered for the plaintiff, *non obstante veredicto*, or why there should not be a new trial (*b*),

Bompas, Serjt., and *Martin*, shewed cause.—The first question is whether, by the French law there has not been a total extinguishment of this debt, as contrasted with a mere barring of the remedy; a distinction in the law of

(a) This was before the new rules Hil. T. 4 Wm. 4.

(b) This rule was granted upon other

grounds than those stated in the case, but it became unnecessary to discuss them.

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prescription, which has been taken by Professor Storey, in his *Commentaries on the Conflict of Laws*, p. 487. That learned author says, "Suppose the Statutes of Limitation of a particular country do not only extinguish the right of action, but the claim or title itself, *ipso facto*, and declare it a nullity after the lapse of the prescribed period; and the parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case; in such a case may not such a statute be set up in any other country to which the parties remove, by way of extinguishment or transfer of the claim or title? This is a point which does not seem to have received as much consideration in the decisions of the common law as it would seem to require." This distinction becomes very important in the consideration of the present case, because by the French law this debt is *ipso facto* extinguished. Section 189 of the *Code de Commerce*, is as follows: "Toutes actions relatives aux lettres de change, et à ceux des billets à ordre souscrits par des négocians, marchands ou banquiers ou pour faits de commerce *se prescrivent* par cinq ans, à compter du jour du protêt, ou de la dernière poursuite juridique, s'il n'y a eu condamnation, ou si la dette n'a été reconnue *par acte séparé*. Néanmoins les prétendus débiteurs seront tenus, s'ils en sont requis, d'affirmer, sous serment, qu'ils ne sont plus redevables; et leurs veuves héritiers ou ayant cause, qu'ils estiment de bonne foi qu'il n'est plus rien dû."

The meaning of the words *se prescrivent* must be looked for in *Code Civil*, Titre xx. "*De la Prescription*," and articles 2219, 2236, 2242, 2244, 2245, 2246, 2247, 2248, 2251, 2264, may be referred to, to shew that by the word prescription, the total extinguishment of the debt is intended. In the same Code, Article 1234, "*De l'Extinction des Obligations*," it is said, "Les obligations s'éteignent, Par le paiement, &c. *et par la prescription*;" and by Art. 1101, and 1107, it is plain that a promissory note is an obligation within the meaning of Art. 1234. The law relating to prescriptions is also contained in the *Code Civil*, Art. 1350, 1352. If this is so, the defendant is discharged. In *Potter v. Brown* (c), Lord Ellenborough says, "The rule was well laid down by Lord Mansfield in *Ballantine v. Golding*, that what is a discharge of a debt in the country where it was contracted, is a discharge of it every where;" and to the same effect is *Burrows v. Jemino* (d). And the contract must always be interpreted according to the law of the place where it was made, *Melan v. The Duke de Fitzjames* (e), *Imlay v. Ellefsen* (f), *De la Vega v. Vianna* (g), *The British Linen Company v. Drummond* (h), *Trimbey v. Vignier* (i).

Taddy, Serjt., *Spankie*, Serjt., and *Cleasby*, *contrà*.—*First*, The third and fourth pleas are bad in form. The 189th sec. of the *Code de Commerce*, which has been referred to, contains an exception, which is not noticed in the pleas, namely, "unless the debt be acknowledged *par acte séparé*." The rule upon this point is laid down by Lord Tenterden in *Vavasour v. Ormrod* (j). If the plea had noticed this exception the plaintiff could have replied that there had been an *acte séparé*, and the question upon that

(c) 5 East, 130.

(d) 2 Strange, 732.

(e) 1 Bos. & Pul. 138.

(f) 2 East, 453.

(g) 1 B. & Ado. 284.

(h) 10 B. & Cres. 903.

(i) 1 Bing. N. C. 159.

(j) 6 B. & Cres. 422; also in 1 William Saund. 234, note (c).

point would then have been raised. But, *secondly*, to retain the verdict on the general issue, the defendant must shew that by the law of *France*, the debt for which he is sued is extinguished. Now what is meant by the extinguishment of a contract? In *Williams v. Jones* (A), Lord *Ellenborough*, in speaking of Statutes of Limitation, says, "Those Statutes could only have the effect of barring the remedy in those courts in the cases provided for them, but they do not extinguish the right." It is not denied that the prescription of the *lex fori* must prevail in all cases. Here the argument proceeds upon the distinction which has been taken in the passage from *Storey's Commentaries on the Conflict of Laws*, but the proposition there laid down, is qualified by the assumption "that the parties are resident within the jurisdiction during all that period, so that the Statute has actually operated upon the case;" but in this case the parties did not reside in *France* for five years after the note was given. But the construction given to the 189th sec. of the *Code de Commerce* cannot be supported. By that section, if an action on a bill of exchange is not brought within five years, a presumption of payment arises; but the claim itself is not extinguished. The extracts read from the *Code Civil*, do not apply, for the *Code de Commerce* is that which contains the law of bills of exchange.

Cur. adv. vult.

TINDAL, C. J.—The answer which the defendant has set up against this action is two-fold. *First*, He relies upon the English Statute of Limitations; and, *Secondly*, Upon the French Law of Prescription, as stated in his third and fourth pleas. As the plea of the Statute of Limitations is disposed of by reason that the replication of the plaintiff's being beyond sea from the time of the cause of action accruing, has been found in his favour, the only ground of defence which it will be necessary to consider will be that which arises from the plea of the French law. One objection made to the defendant's plea of prescription under the French law, is grounded upon the form in which it is pleaded. It is argued that it is pleaded absolutely, and without any exception or qualification. Whereas, according to the proof given at the trial, certain conditions and qualifications were attached to it, and we are of opinion that the objection taken to the form of those pleas ought to prevail. For the law of the French prescription contained in sec. 189 of the *Code de Commerce*, upon which so much argument has taken place, embodies in it a most important exception, which is not noticed in the plea; the exception namely, that the debt is not acknowledged by a separate and distinct act of the party charged, in writing. On this ground we think the verdict which has been entered, *pro forma*, for the defendant on those pleas, must be entered for the plaintiff. But as the same matter of defence may be given in evidence under the general issue, it becomes necessary to consider the general question in the cause: Whether, by the law of *France*, the contract made by the defendant in his promissory note is altogether extinguished, and made null and void in that country by reason of the doctrine of prescription which holds in the French law; or whether, under the doctrine of prescription, the contract itself is not annulled and extinguished, but the remedy only barred in the French courts of law? For we take it to be clearly established and recognised as part of the law of *England*, by various decisions, that if the prescription of the French law, which has been opposed to the plaintiff, is no more than

(A) 13 East, 439.

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a limitation of the time within which the action upon the note must be brought in the French courts, it will not form a bar to the right of action in our English courts, but that the question, whether the action is brought within due and proper time, must be governed by the English Statute. The distinction between that part of the law of the foreign country, where a personal contract is made which *is* adopted, and that which *is not adopted*, by our English courts of law, is well known and established; namely, that so much of the law as affects the rights and merit of the contract, all that relates "*ad litis decisionem*" is adopted from the foreign country, all that affects the remedy only "*ad litis ordinationem*" is taken from the *lex fori* of that country where the action is brought; and that in the interpretation of this rule, the time of limitation of the action falls within the latter division, and is governed by the law of the country where the action is brought, and not by the *lex loci contractus*, is evident from many authorities. In *Huber's Praelectioniones Juris Civilis*, part ii. lib. 1, tit. 3, (*De conflictu legum*) sec. 7, he says, *Ratio hæc est quod præscriptio* (where observe the term "*præscriptio* is used generally for limitation"), *et executio non pertinent ad valorem contractus sed ad tempus et modum actionis instituendæ*. It is unnecessary to cite more; the authorities are collected in the *British Linen Company v. Drummond* (1), which case itself furnishes an authority for the position. Such being the general rule of law, a distinction has been sought to be engrafted on it by the learned counsel for the defendant; that where the Statutes of Limitation of a particular country not only extinguish the right of action, but the claim or title itself, *ipso facto*, and declare it a nullity after the lapse of the prescribed period, that in such case the Statute may be set up in any other country to which the parties remove, by way of extinguishment. This distinction is stated to be adopted from a work, entitled "*Commentarius on the Conflict of Laws*," p. 487, by Joseph Storey, LL. D., a work which it would be unjust to mention, without at the same time paying a tribute to the learning, acuteness, and accuracy of its author; and undoubtedly the distinction, when taken with the qualification annexed to it by the author himself, appears to be well founded: that qualification is, "that the parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case." And with such restriction it does indeed appear but reasonable that the part of the *lex loci contractus*, which declares the contract to be absolutely void at a certain limited time, without any intervening suit, should be equally regarded by the foreign country as the part of the *lex loci contractus* which gives life to, and regulates the construction of the contract. Both parts go equally "*ad valorem contractus*," both "*ad decisionem litis*."

So much, however, being conceded to the defendant, it remains for him to set up and establish to the satisfaction of the Court, the proposition for which he contends, that the French Law of Prescription which applies to the present case is one which extinguishes not only the remedy, but the right or contract itself; for, unless it has this effect in *France*, the case falls within the larger and more general rule that the time of limitation of the action must be governed by the law of the country where the action is brought. Before, however, we come to the argument on this point, it may be expedient to advert to the facts of the present case to which the rule of the French law is proposed to be applied. The action is brought on a promissory note made at *Mulhausen*, which at that time was subject to the law of *France*, where

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both the plaintiff and defendant may be taken to have been then domiciled. The note was made and bore date on the 12th of May, 1818, and was payable to the order of the plaintiff on the 10th of May, 1817. In the course of 1813, very shortly after the making of the note, and nearly four years before it became due, both parties quitted *Mulhausen*, the plaintiff going to *Switzerland*, the defendant to *England*, where he has ever since resided and been domiciled. Under such a state of facts the defendant seeks to apply the 189th article of the *Code de Commerce* as a bar to the present action, on the ground that it operates as an annulling of the contract; as an extinguishment of the claim and right of action in that country. That article is found in the division of the *Code de Commerce* which relates to bills of exchange, and is contained in the following words: namely, "Section 3d of Prescription;" "All actions relative to letters of exchange and to bills to order, subscribed by tradesmen, merchants, and bankers, or for matters of commerce, 'prescribe themselves' by five years, reckoning from the day of protest, or from the last suing out of any judicial process, if there hath been no judgment, or if the debt hath not been acknowledged by any separate act. Nevertheless, the pretended debtors shall be held, if required, to affirm upon oath that they no longer owe the money, and their widows, heirs, &c., that they *bonâ fide* believe there is nothing more due."

Now, the question is, whether the defendant has made out affirmatively to the satisfaction of the Court, that this prescription has the necessary force of extinguishing and annulling the contract upon the note, *ipso facto*, after a lapse of five years from the time it becomes due; for unless the prescription has this force, it operates on the remedy only, which, upon the general principle before laid down and acknowledged, will be governed by the *lex fori*, and not by the *lex loci contractûs*; and after giving every attention to the authorities cited on both sides, we think the French law is not shown to have the force contended for by the defendant. The defendant has brought together different passages in the *Code de Commerce*, and by contrasting them with others which are found in the *Code Civil*, has shewn it possible that such may be the force and effect of the article in question. But he has produced no distinct authority that the contract is intended to be annulled; whereas, on the contrary, the very terms of the article itself, the authorities of text-writers, and the reason of the thing, do so far outweigh, as it appears to us, the inference drawn from the comparison of different parts of the French law, that we cannot but hold the section relied upon amounts only to a limitation of the remedy in the French courts to the space of five years, and not to an utter avoidance of the contract itself, at the end of that period.

The article itself begins by stating, "that all actions prescribe themselves," not "that the contract is prescribed or gone;" the exception that "the action is not prescribed if the debt is acknowledged by a separate writing," the power given to the creditor to put the debtor to his oath that he owes nothing, called in the French law "*le serment décisoire*," all these circumstances agree with the notion that it is the action, not the debt, which is prescribed by the law. Again, the text-writers on the French law lay down the same rule distinctly. Without multiplying authorities, we refer only to *Pothier Traité des obligations*, part 3, chap. 8, "*Des Fins de non-recevoir et Prescriptions contre les créances*," in article 677, he explains prescription "to be the bar from the lapse of time which the law has fixed as the limit of

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an action founded on a debt." And still further, in the same section, where he states the effects of this species of bar, he says—" *Les fins de non-recevoir n'éteignent pas la créance, mais ils la rendent inefficace, en rendant le créancier non-receivable à intenter l'action qui en naît.*" Again,—"*Outre cela, quoique les fins de non-recevoir n'éteignent pas, in rei veritate, la créance, néanmoins elles la font présumer éteinte et acquittée, tant que la fin de non-recevoir subsiste.*" See *Pothier* also, in his *Treatise on the "Contrat de Change*, part 1, cap. 6, article 4, *De la prescription des lettres de change*, where it is laid down broadly by him, in sec. 203, that this prescription is founded only on presumption of payment.

But from the ground of reason and expediency, the inference is still more strong that the prescription limits the action only, and does not destroy the debt; for if the debt itself is absolutely gone by reason of the lapse of five years, without any reference to the power of the plaintiff to sue in the mean time, what would be the condition of the creditor whose debtor quits the country where this law applies before the day of payment arrives, that is, before there is a possibility of maintaining the action, and never returns to it again? To maintain a position so contrary to reason, very strong authority must be expected, but none is shewn. On the contrary, the very text of the book from which the distinction is first taken (*Storey*, page 487), annexes to it the condition that the debtor and creditor have remained within the jurisdiction during the time of the prescription. In this case *both* are absent; it would be enough, however, to say that *the debtor* was absent, to call in aid the maxim of the French, no less than of the civil law, "*contra non valentem agere non currit prescriptio.*"

We do, therefore, think that the law set up on the part of the defendant amounts to no more than a limitation of the time for bringing the action, not to an extinction of the contract; that consequently it is no bar in itself under any circumstances, still less where the debtor ceased to reside in the country where the law prevails during the whole period of time that the debt was owing and due.

This conclusion makes it unnecessary to consider the objection urged on the part of the defendant to the evidence which was offered at the trial, as to the effect of the *acte séparé*, as we place no reliance in the judgment we have given upon the letters of the defendant, which gave rise to that question. We therefore think the verdict must be entered for the plaintiff, upon the general issue, as well as upon the issues arising on the special pleas.

Judgment for the plaintiff.

June 10th.

GROOM, Assignee of DIACK, a Bankrupt, v. MEALEY.

A plea of set-off to an action by the assignee of a bankrupt, must shew that it is pleaded to a debt to which it is strictly applicable.

TROVER by the plaintiffs, as assignees of *Diack*, to recover goods and chattels, of which the plaintiffs were possessed as of their own property as assignees. A second count stated, that the defendant was indebted to the plaintiffs as assignees as aforesaid, in 100*l.* for money received by the defendant for the use of the plaintiffs, as such assignees as aforesaid, and in 100*l.* for money found to be due from the defendant to the plaintiffs, as such assignees as aforesaid, on an account stated between the defendant

and the plaintiffs, *as such assignees as aforesaid*. The defendant pleaded to the second count, that the said *Diack*, before and at the time of his becoming bankrupt, was indebted to the defendant in 300*l.*, for money before then found to be due from *Diack* to the defendant, upon an account before then stated between them, which said sum the defendant offered to set off and allow, &c.

Demurrer to the above plea and *joinder*.

J. Henderson, in support of the demurrer.—*Ridout v. Brough* (a) is in point with the present case. That was an action by the assignees of a bankrupt, and the defendant pleaded a set-off to the whole declaration, which was held ill, because part of the demand was for money received by the defendant from the plaintiffs, as assignees, since the bankruptcy; and if a plea goes to the whole declaration, and is bad as to any one count, it is bad for the whole, *Webb v. Martin* (b). Here the debts are not mutual; for the plaintiffs' demand is for a debt due since the bankruptcy, for which the bankrupt never could have had an action, and the plea sets up a debt due from the bankrupt before the bankruptcy; and there must be mutual remedies, as well as mutual debts, otherwise there is no right of set-off, *Ryall v. Larkin* (c).

Mansel, contra.—It does not appear upon this declaration, that the money accrued due to the plaintiffs after the bankruptcy. It is perfectly consistent with the statement in the declaration, that the plaintiffs are suing for money due from the defendant to the bankrupt, before he became bankrupt. If any doubt exists as to the meaning of the declaration, the construction should be in favour of the defendant. No injustice can arise, because at the trial the judge would take care that the demands are mutual, within the Stat. 6 Geo. 4, c. 16, s. 50. At all events, the demand in the declaration, for money due, on an account stated between the defendant and the plaintiffs "as assignees as aforesaid," must refer to money found to be due to the bankrupt before the bankruptcy.

TINDAL, C. J.—The declaration charges that the defendant was indebted to the plaintiffs, as assignees, for money received by the defendant, for the use of the plaintiffs as assignees; and then there follows a claim for money due on an account stated. The plea is framed generally, to embrace both these claims, and it is bad; for it has not sufficiently guarded itself by shewing what species of debt the set-off was pleaded to. It ought to have shewn expressly, that the case to which the plea was intended to apply, was one to which it was applicable.

The other Judges concurred.

Judgment for the plaintiff.

(a) Cowper, 133.

(b) 1 Lev 48.

(c) 1 Wils. 155

*Com. Pleas.**June 4th.*

In an action on a bill of exchange, evidence of part payment may be given to reduce the damages, although it is not specially pleaded.

SHIRLEY v. JACOBS.

ASSUMPSIT against the acceptor of a bill of exchange for 30*l.* *Plea*.—That the defendant did not accept the said bill of exchange. At the trial, before *Tindal, C. J.*, at the *London Sittings*, after *Hilary Term*, the defendant proved a payment of 11*l.* 15*s.*, on account of the bill; and the learned judge directed the jury to find a verdict for the amount of the bill, minus the payment on account.

Miller obtained a rule *nisi*, to increase the damages to the full amount of the bill, on the ground that evidence of part payment could not be received under the plea on the record.

Bompas, Serjt., and *Mansel*, shewed cause.—It is admitted, that, under *Reg. Hil. T. 4 Wm. 4*, payment in bar or discharge of the action could not be proved, unless specially pleaded; but evidence of payment, in reduction of the damages, is not within that rule. After a judgment, by default, on a bill of exchange, it is referred to the prothonotary to ascertain what is due for principal and interest. It has already been held, in several cases at *Nisi Prius*, that the evidence of part payment may be received, although it is not specially pleaded; thus in ——— v. *Padden (a)*, *Patteson, J.*, allowed evidence of part payment to be given in mitigation of damages.

Miller, contrd.—The rule of *Hil. T. 4 Wm. 4*, is as follows:—"In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded. *Ex. gr.*, infancy; coverture; release; payment; performance; illegality of consideration, either by statute or common law; drawing, indorsing, accepting, &c., bills or notes, by way of accommodation; set-off; mutual credit; unseaworthiness; misrepresentation; concealment; deviation; and various other defences, must be pleaded." A set-off must now, without doubt, be specially pleaded, whether it applies to the whole or a part of the declaration; and the same reason would apply to require that payment, or part payment, should also be pleaded.—[*Vaughan, J.*—A set-off is in the nature of a cross action.]

TINDAL, C. J.—I think the meaning of the rule is, that payment cannot be proved in answer to the action, unless it is specially pleaded. Here the evidence was not offered as an answer to the action, but only in reduction of the damages. The jury have two points to consider under any circumstances; one is, whether the issue is to be found for the plaintiff or the defendant; the other is, the amount of the damages which the plaintiff has sustained. To ascertain the latter, the measure would be that portion of the

(a) *Sewell's Dig.* 275. The following is the MS. note of this case. "A plea of payment which operates as a bar to the action, is not supported by proof of payment of a smaller sum. Such evidence can

only be used by way of liquidation of damages." *Per Patteson, J. Winchester assizes, March, 1835.* But it does not here appear what the plea was, it would rather seem to have been a plea of payment.

bill which remains unpaid, and the interest. Before the new rules, under the general issue, the plaintiff was always allowed to prove a payment on account, in reduction of the demand, even although it was made after issue joined; so now I think it may be given in evidence, for the purpose of reducing the amount of the damages. It would be singular, if the jury saw payment after payment indorsed on the back of the bill, that they should be compelled to give a verdict for the full amount for which it was originally given. When judgment goes by default, evidence of part payment is always received; and I do not think that the new rules intended to put the defendant in a worse situation as to damages than he was in before.

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PARK, J.—I think it right to mention, that I have refused to allow evidence of part payment to be received, where it was not specially pleaded; but I am always willing to give further consideration to any decision which I have given. I agree that, although such evidence cannot now be given in bar of the action, unless specially pleaded, it may given in reduction of damages.

GASKELL, J.—I agree. If we were to hold the contrary, we could not receive evidence that the whole debt was paid after issue was joined.

VAUGHAN, J.—I am of the same opinion. The letter and spirit of the rule is, that you shall not give any thing in evidence which goes to the root of the action, unless it is pleaded. All the matters mentioned in the rule are those which go to the foundation of the action.

Rule discharged.

DOE dem. WATT, Esq. v. MORRIS.

EJECTMENT brought to recover possession of certain lands in the county of *Radnor*; and the declaration contained a demise by the lessor of the plaintiff, on the 15th of *December*, in the first year of his present Majesty's reign.

The defendant pleaded not guilty, and the cause was tried at the last assizes for the county of *Heresford*, when the jury found a verdict for the lessor of the plaintiff, damages one shilling, subject to the opinion of the Court upon the following case:—

The manor of *Iscood*, in the county of *Radnor*, and the waste within the same, were, long before and at the time of making the enclosure hereinafter mentioned, and from thenceforth, until the conveyance to the lessor of the plaintiff hereinafter mentioned, in the possession of our lord the King, who was, during all that time, seized thereof in his demesne, as of fee in right of his Crown.

Before and at the time of the said enclosure, the premises now in the possession of the defendant, and the possession of which is sought to be recovered by the present ejectment, were waste lands, within and parcel of the said manor of *Iscood*.

In the year 1803, the said premises were, without the leave of our lord the

the lessor of the plaintiff was not entitled to bring an ejectment.

2. The commissioners have no power under 57 Geo. 3, c. 97, to sell to a subject the right to recover property to which the Crown had only a right of possession.

1. An enclosure of waste lands had been made on a manor belonging to the Crown, which was held for 23 years without payment of rent, or other acknowledgment. The manor was sold in fee by certain commissioners, by virtue of 57 Geo. 3, c. 97, to the lessor of the plaintiff, who brought an ejectment to recover the enclosure:—*Held*, that although the Crown might have ousted the party in possession of the enclosure,

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King, taken in from the said waste, and were then enclosed, and have been held and occupied from that time to the present as enclosed land, separate and divided from the unenclosed and waste lands of the said manor; and no acknowledgment, or payment of rent, was proved to have been made by the occupier thereof.

In the year 1826, the lessor of the plaintiff purchased from our lord the King the said manor of *Iscoed* and other property, and the same was conveyed to him by the following instrument, which was duly executed, in conformity with the provisions of the 57th *Geo. 3, c. 97*.

“By the Commissioners of his Majesty’s Woods, Forests, and Land Revenues,—

“These are to certify, that, in pursuance of a warrant from the right honourable the Commissioners of his Majesty’s Treasury of the United Kingdom of *Great Britain and Ireland*, bearing date the 19th day of *August*, 1826, the right honourable *Charles Arbuthnot* and *William Dacres Adams*, esq., two of the commissioners of his Majesty’s Woods, Forests, and Land Revenues, for and on behalf of the King’s most excellent Majesty, have contracted and agreed with *James Watt*, of *Aston*, in the county of *Warwick*, esq., for the sale to the said *James Watt* of all that the manor of *Iscoed*, in the county of *Radnor*, with the rights, members, and appurtenances thereto belonging; and all those rents, and yearly sums of money, due and payable to the lord of the said manor, commonly called quit-rents, rents of assize, and customary rents whatsoever, to the said manor belonging or appertaining, due, payable, or issuing out of all and every the lands, tenements and hereditaments, reputed, accepted, taken or known to be part or parcel thereof, or belonging to the said manor; and also all courts baron and courts leet, fines, waifs, estrays, deodands, escheats, forfeitures, reliefs, heriots, services, goods and chattels of felons and fugitives, of outlawed persons, and of persons put in exigent, hawking, hunting, fishing, fowling, and all quarries of stone and slate of every description, and all other franchises, liberties, privileges, immunities, profits, commodities and advantages, with all and every their appurtenances, to the said manor and royalties thereof belonging, or in anywise appertaining (except, nevertheless, and always reserving to his Majesty, his heirs and successors, out of the said sale, for which the contracting and agreeing is hereby certified, all and every advowsons, free dispositions, rights of patronages and presentations of churches, vicarages, and chapels, within the said manor; and all fee-farm rents, not being manorial rents, belonging to the Crown, as lord of the said manor, payable out of or in respect of any premises, within the said manor; and also all mines and minerals whatsoever within the same, with full power to work the same, and every of them, as fully and effectually as if this sale had not been made); which said manor and premises are part of the possessions or land revenues of the Crown, within the ordering and survey of the Court of *Exchequer*, at or for the price or sum of 1,200*l.* of lawful money of *Great Britain*, to be paid by the said *James Watt* into the Bank of *England*, and carried to the account of the public moneys of the commissioners of his Majesty’s Woods, Forests, and Land Revenues, being ‘The Woods and Forest Fund;’ and from and immediately after the payment of the said sum into the Bank, in manner aforesaid, and the enrolment of this certificate, and the

receipt for the said purchase-money in the office of the auditor of the land revenues for the county aforesaid, and thenceforth for ever, the said *James Watt*, and his heirs or assigns, shall be adjudged, deemed, and taken to be in the actual seizin and possession of the said hereditaments and premises, so by him purchased; and shall hold and enjoy the same peaceably and quietly, freed and discharged from all claims and demands of his Majesty, his heirs and successors, or of any person or persons claiming under him or them (except as before excepted), and in as full and as ample a manner, to all intents and purposes, as his Majesty, his heirs or successors, might or could have held or enjoyed the same, if such sale had not been made; by force and virtue of an Act of Parliament, passed in the 57th year of the reign of his late Majesty King *George* the Third, c. 97, intituled, 'An Act for ratifying Articles of Agreement entered into by the right honourable *Henry Hall*, Viscount *Gage*, and the Commissioners of his Majesty's Woods, Forests, and Land Revenues, and for the better management and improvement of the Land Revenues of the Crown.' Given under our hands, this 30th day of *December*, in the year of our Lord 1826.

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"(Signed, &c.)"

No demand of the possession of the premises was made upon the defendant *Morris*, before the commencement of the ejectment; but a notice by the lessor of the plaintiff to quit on the 11th of *December* then next, was on the 13th of *November*, 1830, and before the commencement of the ejectment, served on the tenant in possession.

The said *James Watt* is the lessor of the plaintiff. The declaration was served on the defendant on the 28th of *December*, 1833.

The question for the opinion of the Court is, whether the lessor of the plaintiff is entitled to recover the possession of the premises by this ejectment.

R. V. Richards, for the lessor of the plaintiff (a).—What were the rights of the Crown when this conveyance was made? In *Co. Lit.* 41 b, it is said, "Against the King there shall be no occupant because *nullum tempus occurrit Regi*"; and therefore no man shall gain the King's land by priority of entry." And in the same book, 57 b, "Against the King there is no tenant at sufferance, but he that holdeth over in the cases aforesaid is an intruder upon the King, because there is no laches imputed to the King for not entering." *Elvis v. Archbishop of York* (b), recognizes the same principle, and in *Bac. Abr.* tit. "Prerogative" 6, it is said, "From the presumption that the King is daily employed in the weight and public affairs of government, it hath become an established rule at common law, that no laches shall be imputed to him, nor he any way to suffer in his interests, which are certain and permanent; and this his privilege *quod nullum tempus occurrit Regi* had been conferred by the Statute *de Prærogativo Regis*." It is therefore clear that there had been no adverse possession against the Crown, when the conveyance was made to the lessor of the plaintiff, and the words of the grant are sufficiently large to pass all the interest which the Crown had at that time. The word manor has a very extensive signification; for it will pass "All the

(a) In *Peel v. Owens*, and two other cases, which were argued by *Talfourd*, Serjt. and *Maule*, the same point was raised

and decided, as in the present case; a report of those cases is therefore unnecessary.

(b) 1 Hob. 315.

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demesnes, that is, all the lands whereof the lord is seized within the manor: and also the freehold of all the lands held by copyholders, or other customary tenants, together with all the wastes," *Cruise Digt. (c)*; and in this conveyance it is said, "The said *James Watt*, his heirs or assigns, shall be adjudged, deemed, and taken to be in the actual seizin and possession of the said hereditaments and premises, and shall hold and enjoy the same in as full and as ample manner, to all intents and purposes, as his Majesty, his heirs or successors, might or could have held and enjoyed the same, if such sale had not been made." The Crown being, therefore, in contemplation of law, in actual possession of the land enclosed from the waste, the effect of the purchase-deed is to carry the enclosure, and an actual seizin is conferred on the lessor of the plaintiff.

E. V. Williams, contrd.—It is not contended that a subject can oust the King, or that the King can be affected by any adverse possession by the subject. But this ejectment cannot be sustained for two reasons:—*First*, The land which was enclosed in 1808, did not pass by the conveyance. By Statute 1 Ann. c. 7, sec. 5, no grant for any manor or lands belonging to the Crown shall be made for more than thirty-one years, or three lives; and this conveyance to the lessor of the plaintiff could only be made by virtue of the Statute 57 Geo. 3, c. 97. Sec. 4 of that Statute, enables the commissioners to sell any manors or any waste lands. Here the Court will lean against extending the grant by implication, and as the waste lands are not mentioned in the grant, the waste lands did not pass; for this is not like a case between two subjects, where under the word manor, the wastes might pass as appendant. Therefore, the grant of the waste lands ought to have been by special words, if it was intended they should pass.

Secondly, It may be admitted that the King was in the legal possession of these waste lands, but he was not enabled to transfer to a subject the right to recover them by ejectment. A chose in action and a right of entry are not assignable, 32 Hen. 8, c. 9.—[*Tindal, C J.*—Is the King bound by that Statute, and does it include personal actions?]*—In the Case of Ecclesiastical Persons (d)*, it is said that the King may be bound by a Statute, although not named; for, "The King being head of the Commonwealth, cannot be an instrument to defeat the purview of an act of Parliament made *pro bono publico*." But, admitting that the 32 Hen. 8, c. 9, is not applicable, and that the King may grant a chose in action, has he transferred his right in the present case? In *Dyer*, 1 b (e), it is said, "The King can grant an action after he has cause of action, but not of trespass, because it is uncertain." In the *Marquis of Winchester's case (f)*, it is said, "Admitting, in this case, the writ of error had been given to the Queen; yet it was resolved that by the general grant of the said manor of *Morleston*, and of all her interest, claim and demand in it, although it were made *de gratia speciali et ex certa scientia, et mero motu*, that the writ of error did not pass, because if the King could grant it, it must be, by his prerogative, for no common person can do it, and therefore it ought to be granted by express and precise words." In *Ford and Sheldon's case (g)*, it is said upon the subject of royal grants,

(e) Tit. xxxii. 34.
 (d) 5 Rep. 15 b.
 (e) Note 7.

(f) 3 Rep. 4. b.
 (g) 12 Rep. 2.

"For what the King can grant only by his prerogative, can never pass by general words." It has been contended that the King must be taken to have been in actual possession of the waste lands, meaning that no adverse possession runs against him; but the law recognizes that the King may be out of possession, for Stat. 21 Jac. 1, c. 14; 9 Geo. 3, c. 16 (the *nullum tempus* act), and 10 Geo. 4, c. 50, sec. 96, are all framed upon a supposition that the King may be out of actual possession. If the King is out of possession, he must proceed by an information of intrusion, 21 Jac. 1, c. 14, Sir Geo. Reynolds's case (h). In all cases where the crown possesses a prerogative right, it is enforced with moderation; but in the hands of a subject it may be converted into an engine of oppression. But the grantee of the King has not the same privileges which the King had, Year Book, 14 Hen. 4, 9 B. In Crocker v. Dormer (i), it is said to be a general rule, "that nothing shall pass to or from the Queen, but by matter of record."—[Tindal, C. J.—In Lambert v. Taylor (j), where there was a grant by the King after an inquisition, of a chattel interest belonging to a *felo de se*, the rights of a grantee of the Crown were much discussed.]

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Cur. adv. vult.

TINDAL, C. J.—Two objections have been taken by the defendant, against the plaintiff's right to recover in this ejectment; one, that the enclosed parcels of waste land for which this ejectment is brought, did not pass to the lessor of the plaintiff under the contract of sale made by the commissioners; the other, that under the circumstances stated in the special case, the right of maintaining an ejectment is barred by the Statute of Limitations, 21 Jac. 1, c. 15, s. 1; and we think, upon the best consideration we can bring to the case, which is altogether new in its circumstances, the enclosed parcels of waste, which are the subject of this action, did not pass from the crown to the purchaser under the contract and certificate stated in the special case.

In order to ascertain whether those enclosures passed or not, it will be convenient to consider, *First*, what was the exact interest or right of the crown in such enclosures, at the time the certificate of the commissioners was granted.

Secondly, what interest or rights of the crown the commissioners are empowered or authorized by the Statute 57 Geo. 3, to sell to purchasers.

Lastly, whether the certificate is so framed as to pass the interests or rights of the crown in the same, supposing the commissioners to have power to make sale thereof.

First, at the time of making the contract, that is in the year 1826, it appears from the facts stated in the special case, that with respect to the parcels of waste land in question, there had been a possession adverse to the crown for twenty-three years, during which time they had been separated and divided from the unenclosed and waste lands of the manor. In the course of the argument considerable stress was placed by the counsel for the plaintiff, on the general and acknowledged principle of law, that the King can never be put out of possession by the wrongful entry of a subject. The authorities cited, Coke Lit. 41 (b), 57 (b), 227 (b), and also Staundf. Prerog. Reg. 56 (b), are quite decisive on that point. And upon that principle it was further

(h) 9 Rep. 95, b.

(j) 4 Barn. & Cres. 438.

(i) 1 Popham, 37.

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contended that at the time of making the contract the King was as fully in possession of those parts of the wastes of the manor which were wrongfully enclosed, as of the remainder of the wastes which were still unenclosed. It may be doubtful whether the general expression, above referred to, did at any time intend more than that the remedies given by the law to the King for such a wrong, were remedies which supposed him to be still remaining in possession, such as an information of intrusion, which was in the nature of an action of trespass, *quare clausum fregit*, or the right to charge the trespassers in account, as his bailiffs, for the profits of the premises, of which the possession was so wrongfully taken: at all events, however, giving the fullest extent to that common law principle, since the Statutes of 21 Jac. c. 14, and 9 Geo. 3, c. 16, it seems impossible to contend that there may not be an adverse possession to the crown in point of fact, whatever may be its construction in point of law; for the former Statute begins by providing a remedy wherever the King hath been out of possession by the space of twenty years; and the Statute of 9 Geo. 3, c. 16, sec. 1, enacts that "the King shall not at any time thereafter sue, impeach, question or implead any person of or concerning any manors, lands, &c. by reason of any right or title which hath not first accrued or grown within the space of sixty years next before the first commencing of any suit by his Majesty;" under both which Statutes, and more particularly under the former, is contained a legislative recognition that there may be an adverse possession in fact against the crown, however in point of law, with respect to the nature of the remedy, the possession may be still considered as in the King. But it is to the Statute 21 Jac. 1, c. 14, that reference must be more particularly made, in order to determine the exact position and rights of the crown as to the enclosures which are the subject of this action, at the time of making this contract. And by that Statute it is enacted "that whensoever the King hath been or shall be out of possession by the space of twenty years, or hath not, or shall not have taken the profits of lands, &c. within the space of twenty years before any information of intrusion, brought to recover the same; that in every such case the defendant may plead the general issue, and shall not be pressed to plead specially; and that in such cases the defendant shall retain the possession he had at the time of such information exhibited, until the title be tried, found, or adjudged for the King."

Now the enclosures in question having been made and continued for more than twenty years before the contract, and during the whole of that period, the occupiers of the same having been in actual, though wrongful possession, and no part of the profits thereof having been taken by the crown within the last twenty years, it follows necessarily from the enactment of the Statute, that if the crown, at the time of making the contract, had been desirous to regain the possession in fact, it must have brought an information of intrusion; and that if such information had been brought, and the defendant had pleaded the general issue, he would have been entitled to retain the possession which he then had against the crown, "until the title was tried, found, or adjudged for the King." If such, then, was the right of the crown, and such the situation of the intruder, even against the crown itself, it is obvious that the purchaser cannot be in a better or more favourable condition; for, by the express enactment of the Statute 57 Geo. 3, c. 97, s. 6, the purchaser, after the enrolment of the certificate, "shall be deemed to be in actual

weizin and possession of the premises, rights, and interests by him purchased, and that he shall hold the same as fully and amply to all intents and purposes as his majesty might have done if such sale had not taken place." Such being the rights of the crown previous to, and at the time of making the contract of sale by the commissioners; the next question is, whether the commissioners have power under the 57 *Geo. 3*, c. 97, to make sale, and dispose of property, the actual possession whereof the crown could not recover, except by a prerogative process in a court of law; and in construing that Statute, we think no reliance ought to be placed upon the acknowledged doctrine that the King may, by his prerogative, assign a right of action, or a chose in action; because this is no conveyance or assignment by the King at all; it is a sale by commissioners, who are putting in force the powers for the first time given to them by that Statute; and we think that Statute must be construed by the same rules of construction as any other act of Parliament. Now, by the second section of that Statute, the commissioners are authorized and empowered to contract and agree with any person for the sale of part or parts of the possessions or land revenues of the crown, which shall, in the judgment of the commissioners, be desirable to be sold; which possessions the section proceeds to distribute into two distinct classes of property, there enumerated; of which the first comprises incorporeal, and the second, corporeal hereditaments: and we think it is only necessary to read the clause to be able to see that there is nothing contained in it which points in the most remote way, to the giving the commissioners any authority or power to sell to the subject a right of recovering the possession of wastes, or any property whereof the crown was not in possession in fact, although in contemplation of law it might be deemed to be so for some purposes, whether such recovery was to be effected by bringing a writ of intrusion, or by the finding of an office, or by any other prerogative process whatever.

But, thirdly, even admitting the commissioners to be invested with the power to contract for the sale of the right to recover the possession of these lands; have they, in point of fact, exercised the power on the present occasion? and we think they have not. That the certificate must contain a description of the premises agreed to be sold, appears from the 6th section, which enacts "that they shall grant to the purchaser a certificate under their hands, describing the premises to be sold." Now the description in this case is simply this: "all that the manor of *Iscoed*, with the rights, members, and appurtenances thereto belonging, and all rents and courts baron, and other incidents thereto, &c." The only operative word with respect to the subject of this dispute is "manor;" but, admitting the generality of that term in its utmost latitude, and holding it to comprise all demesne lands and wastes of the manor, we think it cannot be contended, upon any principle of legal construction, to include land in the possession of strangers, who could not be turned out of possession thereof, except by information or inquest of office. Besides, under the information of intrusion, the crown would not only be entitled to a judgment that the defendant shall be removed from the possession, but in some instances to a judgment for damages also; as where the wrong doer has cut the King's trees, *Savil Rep.* 49, a consequence still further removed from the sale of the manor to a subject. And even if these parcels of waste land had not been out of the actual possession of the crown for twenty years, so as to fall within the Statute of 21 *Jac. 1*, c. 14, yet,

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if they had been separated and divided from the remainder of the wastes of the manor, and held adversely to the crown for so long a period of time as to be publicly and generally known by name, or otherwise, as parcels of land distinct from the wastes of the manor, we should have been strongly of opinion that such enclosures would not have passed under the word "manor," the only word in the certificate which is descriptive of land of any kind; the more particularly, as the Statute points to the necessity of a description of the premises contracted to be sold, to enable the officers of the crown to know what is left; and as, in the enumeration of such property, the word *manor* is found in that division which comprises incorporeal hereditaments, and *waste lands* in that class of words which comprise hereditaments of a corporeal nature.

We hold it unnecessary, therefore, to enter upon a discussion of the effect and operation of the Statute of Limitations, upon the present action of ejectment, as we ground our judgment on the points of law before particularly mentioned, that the intruders, after twenty years' adverse possession, were protected even against the crown itself, until a judgment in intrusion; that the commissioners were not empowered, by the Statute, to sell any property of the crown so circumstanced; and that there is nothing in this certificate of sale to shew they intended so to do, even if they had the power. And we think this determination is consistent with the justice of the case, no less than with the law; for great fraud might often be practised on the crown, if, under a contract of sale, by so general a description as that of the present, all encroachments should be held to be included to any value, however great and however ancient, so that they were made within the last sixty years; and, on the other hand, great hardship might be frequently occasioned to persons who never would have been disturbed in their enjoyment, however wrongfully acquired originally, if the manor had still remained in the hands of the crown. It is sufficient to advert to the later Statute 10th Geo. 4. c. 50, s. 96, which is made *in pari materia* with the present act, to shew the great tenderness and clemency on the part of the crown towards persons in possession, of encroachments of much shorter date than that which occurs in this case. For the reasons above given, we think there must be

Judgment for the defendant.

June 9th.

FLIGHT v. GLOSSOP.

Where a defendant became bankrupt after a cause was set down for argument on demurrer, the Court refused to strike it out of the paper at the suggestion of the plaintiff, although the assignees refused to give security for costs.

AFTER a demurrer had been set down for argument the defendant became bankrupt, and thereupon the plaintiff obtained a rule to shew cause why the cause should not be taken out of the paper, upon the ground that the assignees refused to give security for costs.

W. H. Watson shewed cause.—All the expenses have been incurred, and if this rule is made absolute the defendant's attorney will be deprived of the costs to which he would have been entitled if defendant succeeds in the demurrer.

Hoggins supported the rule.

Per Curiam.—Every expense has been incurred, and the defendant might

have been sued improperly. In the absence of all authority to warrant our interference, we must discharge this rule, but without costs.

Rule discharged.

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DOE dem. MARTIN v. ROE.

June 13th.

A RULE had been obtained to shew cause why a judgment and execution in ejectment, should not be set aside, upon the ground that one *Luff*, the landlord of the premises, had not received notice of the declaration in ejectment.

Where judgment and execution in ejectment was regularly obtained without collusion with the tenants in possession, the Court refused to set it aside, as the instance of a party who stated that he was landlord of the premises, and had not received any notice of the declaration in ejectment.

Bompas, Serjt., shewed cause.—This judgment is perfectly regular, and the lessor of the plaintiff denies collusion with the tenants in possession, who were duly served with the notice of declaration in ejectment. And it further appears that the land has been let by the lessor of the plaintiff since possession was obtained. In *Goodtitle v. Badtitle (a)*, which was a case similar to the present, part of the land being sold by the lessor of the plaintiff the Court said, “No collusion is suggested; if the lessor of the plaintiff had colluded with the landlord’s tenant, we could have interfered. But here the case is the same, as if the tenant had delivered over the possession wrongfully to another person. The landlord must bring an action of ejectment to recover it. How can we deal with the lessor of the plaintiff? he has not been to blame. If your tenant has done you wrong, that is only a matter between him and you.” And in *Doe d. Ledger v. Roe (b)*, the Court refused to set aside a judgment and execution, although the landlord shewed a clear title to the property on making the application.

Atree, in support of the rule.—The affidavit, made in support of this rule, states, that “*Luff*, the landlord of the tenants in possession, did not know or believe, or had any reason to believe, that a declaration in ejectment had been served on the tenants in possession; and that he is advised, and believes, that he has, as such landlord as aforesaid, a good title to the premises, and a good defence to the action on the merits.”—[*Tindal*, C. J.—He does not shew that he ever received rent from the tenants in possession, or that he was ever recognized as landlord; and, if you get over that difficulty, then the cases cited are directly in point against you.]—It is not suggested on the other side that *Luff* is not the landlord. In *Doe d. Shaw v. Roe (c)*, where a similar affidavit to the above was made, the Court set aside the judgment and execution, although *Doe d. Ledger v. Roe (b)*, and *Goodtitle v. Badtitle (a)*, were cited.

TINDAL, C. J.—The cases cited against this rule are decisive; and we have no authority to interfere. Collusion with the tenants in possession is positively denied.

Rule discharged.

(a) 4 Taunt. 820.
(b) 3 Taunt. 506.

(c) 13 Price, 260.

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June 12th.

If a defendant neglects to pay the debt and costs indorsed on a writ within four days from the service (R. Hil. T. 2 Wm. 4, II.), the plaintiff may state a further claim in his declaration.

BOWDITCH v. SLANEY.

THE plaintiff sued the defendant in assumpsit, and the writ was indorsed for 8*l.* 10*s.* and costs (a). The declaration demanded the 8*l.* 10*s.* indorsed on the writ, and also contained a special count for certain costs and expenses, which the plaintiff had incurred; and to pay which the defendant was liable. After the declaration was delivered, and more than four days after the service of the writ, the defendant obtained a judge's order to stay the proceedings, on payment of the 8*l.* 10*s.* and costs, according to the indorsement on the writ.

A rule having being obtained to set aside the order,

J. Bayley shewed cause.—The defendant has offered to pay the full amount of the plaintiff's claim. If the plaintiff has other claims he may bring another action, *Seddon v. Tutop* (b). The present application is, in effect, to amend the indorsement on the writ, which will not be allowed, *Trotter v. Bass* (c).

Channell, in support of the rule.—Before the rule of *Hil. Term*, 2 Wm. 4, c. 2, the plaintiff could add a demand in his declaration, which did not appear in the writ, and that may still be done. The declaration contains a specific demand of the 8*l.* 10*s.*, and another claim for unliquidated damages, which the plaintiff had been erroneously advised could not be claimed in the same action. The defendant might have taken advantage of the rule, and paid the debt and costs within the four days; but having neglected to do so, the rule is no longer applicable, and the plaintiff stands in the same situation as he would have been in, if the rule had never passed.—[*Tindal C. J.*—Why do you mislead the parties by your indorsement? you now claim unliquidated damages.]—[*Park, J.*—It is a case where there should not have been any indorsement.]

TINDAL, C. J.—The only question is, whether the defendant has brought himself within the rule which gives him four days to pay the debt and costs. He has not done so, and therefore further proceedings cannot now be stayed, and the rule for discharging the judge's order must be made absolute. But the costs of the rule must be costs in the cause.

The other judges concurred.

Rule absolute.

(a) The form of indorsement given by Reg. Hil. T. 2 Wm. 4, II. is, "The plaintiff claims £ for debt, and £ for costs, and if the amount thereof be paid to the plaintiff or his attorney within four days

from the service hereof, further proceedings will be stayed."

(b) 6 T. R. 807.

(c) 1 Bing. N. C. 516; S. C. *ante*, 53.

THOMPSON v. THOMPSON.

THE declaration stated, that on the 31st of *October*, 1831, by a certain indenture, between one *George Smallwood* of the first part; the defendant of the second part; and the plaintiff of the third part; and one *Frederick Elijah Thompson* of the fourth part; the said *G. Smallwood* did grant, &c. to the plaintiff, his executors, administrators, and assigns, for 100 years, if the plaintiff and *E. T., W. T., and E. T.*, or either of them, should so long live; one annuity of 112*l.*, to be yearly issuing, going, had, received and taken by him, the plaintiff, his executors, administrators, and assigns, out of, and charged upon, a certain piece or parcel of ground therein described, together with six several messuages then erecting thereon, with the appurtenances, to have, hold, receive, and take the said annuity unto the plaintiff, his executors, administrators, and assigns, thenceforth, for the said term of 100 years, determinable as thereinbefore mentioned, and to be paid by four equal quarterly payments; on the 31st day of *January*, the 30th day of *April*, the 31st day of *July*, and the 31st day of *October*, in every year, without deduction; the first payment to be made on the 31st day of *January* then next. And the defendant, at the request, and as surety for the said *G. Smallwood*, did thereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the plaintiff, his executors, &c. that if the said *G. Smallwood*, his heirs, executors, or administrators, should make any default in payment of the said annuity thereby granted, or any quarterly payment thereof, or in payment of such costs, charges, damages, and expenses, as should be incurred by, or occasioned to the plaintiff by reason of the non-payment, or delay in payment of the same annuity, or any part thereof, then that he the defendant, his heirs, &c. should and would from time to time, from and immediately after any such default should be made as aforesaid, pay unto the plaintiff the said annuity thereby granted to him, and all arrears thereof, and all costs to be occasioned to him by reason of any default in payment of the said annuity, or any part thereof; and the defendant did thereby, for himself, his heirs, executors, and administrators, further covenant, promise, and agree to and with the plaintiff, his executors, &c., that he the said *G. Smallwood*, his executors, or administrators, would at his and their own proper costs and charges, forthwith complete and finish the said six several messuages thereby demised, for a certain term therein mentioned, in trust, to secure the due payment of the said annuity, in a substantial and workmanlike manner, and with good and proper materials of all sorts, and in all respects fit for habitation and use, on or before the 24th day of *June*, 1832: That, afterwards, on the 30th day of *April*, 1834, the sum of 280*l.* of the said annuity, for two years, and two quarters of another year, which expired on the day and year last aforesaid, became, and was due to the plaintiff, and that the said *G. Smallwood* had not paid the same; and the plaintiff further saith, that he hath sustained by reason of the default in payment of the said annuity as aforesaid, divers expenses, amounting to the sum of 30*l.*; but the said *G. Smallwood* had not paid the same, of all which premises the defendant had notice; yet the defendant had not paid to the plaintiff the sum of 280*l.*, nor had he paid any part of the said sum of 30*l.* to the plaintiff, contrary to the said

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The defendant covenanted, as surety for one *Smallwood*, for the due payment of an annuity, and that *Smallwood* should complete the building of certain houses to secure the annuity:—*Held*, that a claim for arrears of the annuity which became due after the bankruptcy of the defendant, was not barred by his certificate. Secondly, That a breach assigned that the houses were not finished by *Smallwood* was a claim for general and unliquidated damages not provable under the bankruptcy of the defendant and was not therefore barred by his certificate.

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indenture, and to the covenant of the defendant in that behalf made as aforesaid; and the plaintiff further saith, that the said *G. Smallwood* did not, on or before the said 24th of *June*, 1832, or since, complete or finish the said six several messuages in a substantial manner, &c.; and the said six messuages still remain incomplete and unfit for habitation, whereby the said term became forfeited and void, and the plaintiff hath lost the benefit of the security he would otherwise have had in respect thereof, for the payment of the said annuity, and is otherwise damnified.

To the damage of the plaintiff of 1500*l*.

Pleas.—*First*, As to so much of the declaration as relates to the non-payment of the 280*l*., the defendant saith, that after the making of the said indenture, and after the said cause of action accrued, to wit, on the 8th of *December*, 1831, he the defendant became a bankrupt, and that the said cause of action accrued to the plaintiff before the defendant so became a bankrupt. *Conclusion* to the country.

Second Plea, As to so much of the declaration as related to the non-payment of the 30*l*., a like plea to the first. *Conclusion* to the country.

Third Plea, And as to the said breach of covenant, lastly above assigned, the said defendant saith that he became a bankrupt, and that the said last-mentioned cause of action accrued to the plaintiff before the defendant became a bankrupt as aforesaid. *Conclusion* to the country. Issue was joined on all the pleas.

The cause was tried before *Park, J.*, when a special verdict was taken by consent for the plaintiff, with liberty to move and enter a nonsuit, or to reduce the damages, if the Court should be of opinion that either of the sums mentioned in the declaration was not recoverable.

The special verdict found that the defendant was duly declared a bankrupt on the 8th of *December*, 1831; and obtained his certificate on the 3d of *April*, 1833: that 140*l*., part of the said sum of 280*l*., mentioned in the declaration, became due to the plaintiff before the said 3d of *April*, 1833, and that 140*l*., the residue of said sum of 280*l*., became due to the plaintiff since the said 3d of *April*, 1833; "but whether or not upon the whole matters aforesaid found, the said certificate is a bar to the said plaintiff's action, so far as relates to the said breach of covenant in the said declaration first above assigned, the jurors aforesaid are altogether ignorant; and thereupon they pray the advice of the Court. And if upon the whole matter aforesaid, it shall seem to the said Court that the said certificate is not such bar as aforesaid, then the jurors say, that the said causes of action in respect of the first breach in the said declaration assigned did not accrue to the said plaintiff before the said defendant became a bankrupt; and in that case they assess the damages of the said plaintiff, by reason thereof, over and above the costs, &c. to 280*l*.; but if upon the whole of the matter aforesaid, it shall seem to the said Court that the said certificate is such bar as aforesaid, then the jurors aforesaid say, that the said causes of action in respect to the said first breach accrued to the said plaintiff before the said defendant became a bankrupt as aforesaid. And the said jurors aforesaid say, that the cause of action in respect of the breach of covenant in the said declaration lastly assigned, also accrued to the said plaintiff before the said 3d day of *April*, 1833; but whether or not upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, the said certificate was a bar to the said action of the

said plaintiff, so far as it relates to the said breach of covenant lastly above assigned, the jurors aforesaid are altogether ignorant, and thereupon they pray the advice of the Court; and if upon the whole matter aforesaid, it shall seem to the said Court that the said certificate was not such bar as last aforesaid, then the jurors aforesaid say, that the said cause of action in respect of the said breach of covenant in the said declaration lastly assigned, did not accrue to the said plaintiff before the said defendant became a bankrupt as aforesaid, and in that case they assess the damages of the said plaintiff by reason thereof, over and above his costs, &c., to 1220*l.*, and for those costs and charges to 40*s.* But, if upon the whole matter aforesaid, it shall seem to the said Court that the said certificate was such a bar as last aforesaid, then the jurors aforesaid say, that the said cause of action in respect of the said last-mentioned breach of covenant did accrue to the said plaintiff before the said defendant so became a bankrupt as aforesaid.

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Adams, Serjt., for the plaintiff.—The plaintiff is entitled to recover, for neither of the claims stated in the declaration is barred by the bankruptcy of the defendant :—*First*, The plaintiff is not an annuity creditor within sec. 54 of the 6 *Geo.* 4, c. 16, for the defendant is only a surety for *Smallwood*, who granted the annuity; therefore the case is not applicable to that section of the Statute. *Secondly*, The rest of the plaintiff's claim is for unliquidated damages, which it would have been impossible to make the subject of proof under the bankruptcy, and the case is not within the 56th section, which states, "That if any bankrupt shall, before the issuing of the commission, have contracted any *debt* payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted, may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividend with the other creditors, not disturbing any former dividends." Upon principle, the undertaking to pay money upon the default of another, is not a debt within the meaning of this section. In *Atwood v. Partridge* (a), the defendant covenanted as a surety for the due payment of a premium on a policy of insurance. The premium became due on the 17th of *June*, and being unpaid, it was paid by the plaintiff; and it was held that the plaintiff could recover the amount of the premium from the defendant, although, having been made a bankrupt, he had obtained his certificate on the 20th of *June*; and *Best, C. J.*, said, it was clearly not a debt within sec. 56 of 6 *Geo.* 4, c. 16. The same view of the Statute is also taken in *Taylor v. Young* (b), and *Overseers of St. Martin in the Fields v. Warren* (c).

R. Alexander, contrd.—No distinction can be taken between the claims for the two instalments of 140*l.* each; for if one is recoverable, both are. If the defendant is not discharged by his certificate, he will be liable to continual demands for arrears of the annuity, notwithstanding he may be a beggar,

(a) 4 Bing. 209.

(b) 3 B. & A. 521.

(c) 1 B. & Ald. 491.

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and utterly unable to pay. But by a liberal construction of the 56th section of the Statute, the demand in question was proveable under the bankruptcy. The effect of that section is considered in *Eden on the Bankrupt Laws* (d). The meaning of the words *contracted a debt payable upon a contingency*, has been considered in *Ex parte Tindal* (e), when *Tindal, C. J.*, said, "There are two questions; First, Whether the bankrupt has contracted a debt payable upon a contingency, within the meaning of the 56th section of 6 Geo. 4, c. 16. It is contended on the behalf of the assignees, that the contract entered into by the bankrupt is not a debt, but merely a covenant that the executors of the bankrupt shall pay a sum of money on a collateral event. But we are of opinion, that the contract contained in the settlement is a debt which the bankrupt has contracted, within the meaning of the 56th section of the Bankrupt Act. A covenant to pay a sum of money constitutes a debt; and an action of debt, so called, may be maintained upon it." The present case has been before the Court of Review in *Ex parte Thompson* (f), and there the judges held that this debt was not proveable under the commission; but there are several important cases which were not cited upon that occasion. These seem to establish that such a demand as the present ought to have been allowed to be proved under the 56th section. *Ex parte Myers* (g), *Ex parte Lewis* (h), *Pattison v. Banks* (i), *Brooks v. Lloyd* (j), *Baxter v. Nicholls* (k). In *Bire v. Moreau* (l), *Burrough, J.*, remarked that the words in the 56th section, meant "a contract upon a contingency." There are other cases decided under the repealed Act of 49 Geo. 3, c. 121, which seem to support that view of the case, *Hoffman v. Foudrinier* (m).

Cur. adv. vult.

June 17th.

TINDAL, C. J.—The question arising on this special verdict is, whether the several breaches of covenant stated in the declaration, are either debts, or are claims and demands, which are by the Statute made proveable under the commission; for unless they fall within that description, the certificate will be no bar within the 6th G. 4, c. 16, s. 127; and consequently the plaintiff will be entitled to the verdict.

Now, as to the breach of covenant, which is lastly assigned in the declaration, viz., that *G. Smallwood* did not complete and finish the messuages therein described, so as to make them fit for habitation on or before the 24th of June, 1832; that is a demand for general and unliquidated damages, such as cannot be ascertained without the intervention of a jury; and is altogether incapable of forming the subject of a proof by the affidavit or deposition of the party himself. Such damages, therefore, can never be considered as a debt or demand proveable under a commission. Again, as to the second breach of covenant, which is for 30*l.*, alleged to be the expenses, costs, and damages sustained by the defendant, by reason of the non-payment of the annuity; that breach appears also to be open to the same objection as the last; besides which, it is clear that if the plaintiff had no right to prove under the commission, the annuity itself, which is the

(d) Page 125, 2d ed.
 (e) 1 Montague, 379.
 (f) 1 Mont. & Bligh, 219.
 (g) 2 Deacon & Chitty, 251.
 (h) 1 Mont. & M'A. 426.

(i) Cowp. 540.
 (j) 1 T. R. 17.
 (k) 4 Taunt. 90.
 (l) 4 Bing. 59.
 (m) 5 M. & S. 121.

principal debt, he cannot be allowed to prove these damages, which are only incidental and accessory to the annuity itself.

The question, therefore, upon this record is reduced to the simple point, whether the instalments of an annuity, for the payment of which the bankrupt is surety only, and which he expressly covenants to pay in case of the default of the grantor, are proveable, under a fiat, against the surety, where such instalments do not become due until after the bankruptcy of the surety; and we are of opinion that they are not. If such a demand is proveable at all, it must fall within the provisions of the 56th section of the Statute, and no other. For as to the 54th section, its object was to enable the annuity creditor of any bankrupt, to prove for the value of an annuity under a commission against the grantor. But the plaintiff in this case is not the annuity creditor of the defendant the bankrupt. The defendant neither granted the annuity, nor covenanted absolutely for its payment; he only covenanted to pay in case the grantor should make default; it is clear therefore that the case is not within the 54th section. The 55th section was passed to enable the collateral surety for payment of an annuity, to come in under a commission issued against the principal debtor. It is unnecessary, therefore, to say that this section cannot apply to the present case, where the commission has been issued, not against the grantor of the annuity, but against the surety himself. No section, therefore, can possibly apply to this case, except it be the 56th. That section provides for two cases; first, Where there is "a debt payable upon a contingency which has not happened before the issuing of the commission;" in which case the commissioners are directed to ascertain the value thereof, and to admit the creditor to prove the amount so ascertained: the second case is, "Where the value shall not be ascertained before the contingency shall have happened;" and in that event, the creditor may, after such contingency shall have happened, prove in respect of the debt, and receive dividends with the other creditors, not disturbing any former dividends; and the question is, whether the instalments mentioned in the first breach of the declaration fall within either the one or the other of these provisions.

We think it clear, that the quarterly payments of the annuity, not falling due until after issuing of the commission, are not comprised within the *first part* of the section. Before the days of payment arrived, these instalments are not only no debt, but can never become a debt from the surety, except on the event that *Smallwood*, the grantor of the annuity, shall make default in such payments. But the value of such a contingency it is impossible to calculate; the liability of the surety would depend upon the power and the will of the principal to pay the first quarter, and also the subsequent instalments as they fall due; and it is needless to say, that such a contingency cannot be subjected to any known law of calculation; and accordingly, when the present plaintiff, before any quarterly payment became due, applied to the commissioner to ascertain the value of the annuity, and to allow him to prove such value, the commissioner rejected the proof; and we agree in the judgment given by the Court of Review, who held such rejection to be right (n).

If the instalments of an annuity are proveable at all, it must either be by proving the present value of the whole annuity, or by proving the separate

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(n) See *Esarte Thompson*, Mont. & Bligh, 219.

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value of each instalment as it falls due. But it is obvious that the Act has made no provision for the proof of the present value of the annuity against the estate of the surety. If the whole annuity is allowed to be proved against the estate of the surety, there is no provision in the Statute for reimbursing the surety, by enabling the assignees to look to the principal debtor for indemnity; whereas in the case of the bankruptcy of the grantor of the annuity, and the annuity being proved against his estate, a provision is made for the indemnity of the surety by the 55th section; namely, that the surety, by paying to the creditor the ascertained value of the annuity, may have the benefit of the proof of the annuity creditor against the bankrupt's estate. By this course the whole of the annuity transaction is closed, as to all the parties; the grantor, the surety, and the annuitant. The absence, therefore, of any similar provision in the case of the surety becoming bankrupt, leads to the inference that it was not intended to provide for such case by the Statute, but that it should be left as it stood at common law: and we think, as the whole value of the annuity is not proveable at once under the 56th section, so neither is each particular instalment proveable after the contingency happens: for the 54th section of the Act deals with an annuity as a debt of a peculiar nature, and proveable in one way only, directing the present value of the whole of the annuity to be ascertained, and such whole value to be the subject of proof; not that each successive instalment shall be proved as it becomes due. And if the annuity is so dealt with under the 54th section, where the proof takes place against the grantor's estate, there is no reason to suppose the legislature would have treated it differently under the 56th section, as against the estate of the surety, if such annuity was intended to be proved under that section; and indeed it would be a great hardship on the annuity creditor to compel him to prove each separate instalment as it became due; that is, as the contingency of the default of the principal debtor happened through a long series of years, for that would in effect be to take away from him the whole benefit of his security, without giving him a real share under the estate.

This decision does not in any manner overrule the case of the proof against the estate of the guarantee, or surety, for a debt after the default of the principal, which proof was allowed in *Ex parte Myers and others* (o), but is limited to the case before us, the proof of the instalments of an annuity.

As therefore we consider that no part of the demand in this declaration was proveable under the commission against the defendant, we think there must be judgment for the plaintiff.

Judgment for the plaintiff.

(IN THE EXCHEQUER CHAMBER.)

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DOE d. BARRETT v. KEMP.

June 9th.

THIS cause came on for argument on a bill of exceptions, which had been tendered at *Nisi Prius*, before Lord *Lyndhurst*, C. B. at the *Norfolk* Summer Assizes, 1832. The ejectment was brought to recover possession of three cottages (a) built on a small piece of waste land, which the defendant claimed as being built on the waste of his manor. The bill of exceptions set out the evidence given at the trial as follows (b) :—

“ And upon the trial of the said issue, the counsel learned in the law, for the said *John Doe*, to maintain and prove the said issue on his part, proved by the testimony of *James Smith* as follows. That he knew the cottage No. 1, now occupied by *Baker*, and remembered its being built, and was the first tenant. It was begun in 1800, but not quite finished; he went and entered; and that *Daniel Lingwood* had occupied the ground on which it was built for several years before, and his father before him. That he paid rent to *Lingwood* for it, for six years and a half; and that *Robert Ayton* came in after him, and Mrs. *Lingwood* (wife of *Daniel Lingwood*) lived in the house till 1817. That he took *Daniel Lingwood*, in 1817, to a lunatic asylum, and took him from No. 1, and that his wife remained in the said house for several months afterwards. He died in 1819, and never left the asylum after he took him there. He knew the scite of No. 1; the stall-house was on part of it, and the fair stuff was kept in it. He did not recollect if the way to the stall-house was through it. *Goss* used to build the stalls. He knew *John Start*, he lived in the manor-house, and had the manor-farm, he died five or six years ago. He knew the spot where Nos. 2 and 3 were built. It lies between the land of Lord *Orford* and the high road. The fair was held on the hill in front of the Crown, which adjoins No. 1. It was green once, and it was one thing or thereabouts where 2 and 3 are. He remembered once a wild-beast show and two or three other little things there, and a ten-pin ground, and nine-holes. After *Lingwood* had built No. 1, he heard him say he had got another free grant, and was going to build. He said he had a grant, but did not say from whom he got it. Sir *William Robert Kemp* (the defendant) has been in the parish sixteen or seventeen years; he thought No. 3 was built since he came. The former lady of the manor did not live at *Gissing*. He knew *Slough-lane*, and Lord *Orford* had land there; and a piece of waste was enclosed there by Lord *Orford*, between his lordship's land and the road. He has paid quit-rent for this enclosure to the lord of the manor, for Lord *Orford*. The steward ordered him to pay all poor-rates, and all of that description. *Slough-lane* is a mile off these cottages. He never paid any quit-rent for his house. There was a little strip between my house and No. 2, which he (the said *James Smith*) enclosed. He was and is tenant to Lord *Orford*;

Upon a question whether waste land on the side of a road belonged to the owner of the adjoining enclosure, or to the lord of the manor, grants made by the lord of the waste lands lying on both sides of the road at a considerable distance from the spot in dispute, but in continuity with it, are admissible in evidence; acts of ownership having been proved to have been exercised by the lord, on the waste in the immediate vicinity of the wastes adjoining to the plaintiff's enclosure.

2. But grants made by the lord, of waste lands in other parts of the manor, which were not in continuity with the spot in dispute, are not admissible in evidence.

(a) These cottages are described as Nos. 1, 2, and 3, in the plan referred to in the evidence.

(b) This ejectment was tried before Mr. Justice *Littledale* in 1831, and that learned judge refused to receive the evidence which was the subject of consideration in the Ex-

chequer Chamber. In *Doe d. Barrett v. Kemp*, 7 Bing. 832, a new trial was granted by the Court of *Common Pleas*, upon the ground that the evidence ought to have been received. The statement of that case, appears in the judgment of the Court.

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he never paid any thing for it, or obtained any licence. The fair is held on *Church-green*, and the road to *Diss* is between the fair and the spot where Nos. 2 and 3 are built. The booths were on the green, and there was no room for nine-pins on the *Church-green*. *Lingwood* enclosed all where the houses Nos. 2 and 3 stand at first, and afterwards another little bit which comes just up to the spot where he (the said *James Smith*) enclosed. Beyond the *Hall Farm*, the strip of which this is part ceases, and there are houses between the strip of which this is part and the bridge. They are as old houses as he can remember, and there is no green there.

"*James Francis* was also called by the same counsel for the said *John Doe*, and proved, that he went to live in No. 2, in 1811, as tenant to *Lingwood*, to whom he paid rent till 1817, afterwards to Sir *William Robert Kemp*, who told him *Lingwood* was gone to the asylum. He had had leave from Sir *William Robert Kemp* to take gravel from land between Lord *Orford's* land and the road, but he did not know in what manor, and it is 100 yards on the other side of the bridge.

"The said counsel for the said *John Doe* then put in and proved a mortgage, dated 22d *January*, 1809, from the said *Daniel Lingwood*, to one *John Barrett* the elder, for the term of 1000 years, for securing the sum of 80*l.* and interest, of the houses Nos. 1, 2, and 3, with the appurtenances; and also the probate of the will of the said *John Barrett* the elder, deceased, by which it appeared that the said *John Barrett*, the lessor of the plaintiff, in the said pleadings in this cause mentioned, was appointed sole executor of the will of the said *John Barrett* the elder, deceased.

"And on the said trial, the counsel learned in the law for the said Sir *William Robert Kemp*, to maintain and prove the said issue on his part, then and there gave in evidence, and produced from the court books of the manor of *Gissing Kemps with Dallings*, a certain grant dated 9th *March*, 1798, to the said *Lingwood*, of leave to enclose a certain part of the waste land of the said manor, on which the said *Lingwood* afterwards built No. 1.

"And the said counsel for the said Sir *William Robert Kemp*, did then and there give in evidence a grant from the lord of the manor of *Gissing Kemps with Dallings*, to *William Start*, in the year 1804, of a piece of a strip of land, being a continuation of that on which the cottages Nos. 2 and 3 are built, and abutting towards them on the west.

"And the said counsel for the said Sir *William Robert Kemp*, then and there proved, by the testimony of *Robert Ayton*, as follows (that is to say): That he knew the land before Nos. 2 and 3 were built, and that the lord's pound stood about fifty yards further on the strip of green between the land of the defendant and the high road; and that he took down a tree more than twenty years ago, near the pound, which he carried to the manor farm; and that the tenants of the manor turned their cattle on the green on which the pound stood.

"And the said counsel for the said Sir *William Robert Kemp*, further proved, by the testimony of *John Wood*, that he was deputy steward of the manor, and attended the courts since 1819, and that the two manors extended over the whole parish.

"And the said counsel for the said Sir *William Robert Kemp*, further proved, by the testimony of *James Smith*, that he had lived in the parish ever since he was born, and had beat the boundaries of the parish, and never

heard of any difference between the boundaries of the parish and the manor ; and that the *Long-Row* and the pound were in *Gissing Manor* ; that he knew the *Long-Row Road*, *Hall-green*, *Well-green*, *Corn-hill*, and *Burston-green*, and always understood that they were in that manor, and the cottages Nos. 2 and 3 also, and the greens beyond to the bridge, down to *Tibenham-road*, and the greens and other way, and the *Hall-green* ; and that it occupied land in the *Broadway*, which was formerly waste.

“ And the said counsel for the said Sir *William Robert Kemp*, also then and there tendered, and offered to give in evidence, on behalf of the said Sir *William Robert Kemp*, in order to prove the title of the said Sir *William Robert Kemp* to the lands in dispute, divers grants from divers of the lords of the respective manors of *Gissing Kemps* with *Dallings*, and *Gissing* with *Dagworth*, to divers persons, of licence to enclose parts of land lying between the high road and the lands of other persons ; one of which grants related to lands lying at the side of the *Long Row*, upwards of two miles from the lands in dispute, and which grant was as follows :—

“ The manor of *Gissing Kemps* with *Dallings*. Court held 1st April, 1807.

“ At this Court the lady and lords of this manor do give and grant leave and licence unto *J. Clarke* (c), of *Gissing*, in the county of *Norfolk*, cordwainer, to enclose part of the waste land of the said lady and lords, containing seven rods, by survey, called *Long Row Road* in *Gissing*, on the east side of the said road ; he the said *John Clarke*, and his assigns, for and during the term of his natural life, paying yearly to the lady and lords of this manor, and their successors, on the 11th day of *October*, in every year, the rent or sum of 2s. 6d. for the said piece or parcel of land ; and the said *John Clarke*, in his own proper person, paid to the lady and lords 2s. 6d. for a relief, and his fealty is respited, and so forth.”

And another of such grants was to one *Susannah Hunt* (d), and was as follows :—

“ The manor of *Gissing Kemps* with *Dallings*. Court held 14th March, 1800.

“ At this Court the lady and lords of this manor do give and grant leave and licence unto *Susannah*, the wife of *John Hunt*, of *Gissing*, in the county of *Norfolk*, surgeon, to enclose part of the waste land of the said lady and lords, containing, by survey, ten rods ; she, the said *Susannah Hunt*, paying yearly to the lady and lords of this manor, and their successors, upon the 11th day of *October*, in every year, the annual rent or sum of 1s. for the said piece or parcel of land, and the like sum of 1s. upon every death, or alienation of the said premises. And the said *Susannah Hunt*, in her own proper person, pays to the lady and lords 1s. for relief :—

“ Whereupon the said counsel for the said *John Doe*, then objected to the said evidence, and insisted that the same was not admissible ; but the said Lord Chief Baron then and there held the same to be admissible, and received the same, and left the said grants for the consideration of the jury ; whereupon the said counsel for the said *John Doe* excepted to the opinion of the

(c) The grants to *Bolton* and *Gilbert*, mentioned in the judgment, which were similar to the above, were also stated to have been offered in evidence.

(d) The grants to *Harrison* and *Spurden*, mentioned in the judgment, were similar to this grant, and were also stated to have been offered in evidence.

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said Lord Chief Baron. And the said counsel for the said Sir *William Robert Kemp* did then and there prove by the testimony of *John Wood*, the late steward of the manor of the said Sir *William Robert Kemp*, that the *Long-Row Road* is on the other side of the bridge, and not on that side on which the lands in dispute lie; and that there is a complete cessation of the green for sixty or seventy yards, which is not renewed till you have crossed the bridge (in going from the lands in dispute), sixty or seventy yards, and that there is no green against the chequers, and that there are many ancient houses on both sides of the way, between the end of the said green on that side of the bridge on which the lands in dispute lie, and the green on the other side of the bridge; and that there are many strips of green unenclosed on the other side of the bridge, lying between the lands of Lord *Orford* and the high road. And the said Lord Chief Baron did then and there declare, and deliver his opinion to the jury aforesaid, as to the land and cottage No. 1, and directed a verdict for the defendant.

"And the said Lord Chief Baron, as to the land and cottages Nos. 2 and 3, did then and there further declare and deliver his opinion to the jury aforesaid, that the said other grants so as aforesaid made by divers of the lords of the said respective manors of *Gissing Kemps* with *Dallings*, and *Gissing* with *Dagworth*, of leave to enclose part of the waste land, to *Clarke* and others as aforesaid, and which had been read in evidence, and which was objected and excepted to as aforesaid, were proper to be considered and weighed by the jury.

"And the said Lord Chief Baron did then and there leave the whole of the evidence aforesaid for the consideration of the jury, who thereupon found their verdict for the defendant.

"And inasmuch as the said several matters so produced and given in evidence in the said cause, and by the said counsel for the said plaintiff objected and insisted on as aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the aforesaid plaintiff did then and there propose the aforesaid exceptions to the opinion of the said Lord Chief Baron, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence, and objected and insisted upon as aforesaid, according to the form of the Statute in that case made and provided; and thereupon the said Lord Chief Baron, at the request of the said counsel for the said plaintiff, did put his seal to this bill of exceptions, pursuant to the aforesaid Statute in such case made and provided, on the 27th day of *July*, in the second year of his present Majesty's reign.

"LYNDHURST." (L. S.)

Sir *W. W. Follett*, for the plaintiff.—The evidence now before the Court is different from that which was before the Court of *Common Pleas* in 1831, and the acts of ownership upon the land in dispute are all in favour of the plaintiff. In considering whether the evidence was admissible, it is necessary to look at the locality of the premises. The defendant seeks to establish his right by proving acts of ownership exercised two miles from the disputed premises; and *Doe d. Barrett v. Kemp (e)*, will be relied upon by the

defendant; but the judgment delivered in that case cannot be supported. It may be admitted that Lord *Orford* derived his title under a grant from the lord of the manor; but what is there to shew that the grantee did not leave the strip of ground in question between his enclosure and the road? The cases cited for the defendant, in *Doe d. Barrett v. Kemp* (f), do not bear out the judgment of the Court. The facts in *Stanley v. White* (g) are essentially different from the facts in this case. That was an action of trespass for cutting down and converting trees, which defendant justified, as growing upon his soil and freehold. Plaintiff replied that the trees were his freehold, and not the freehold of defendant; and this was held to be proved by shewing that they grew on a certain woody belt, fifteen feet wide, which surrounded plaintiff's land, but was undivided by any fences from the several closes adjoining, of which it formed part, belonging to different owners; and that from time to time, plaintiff and his ancestors, at their pleasure, cut down for their own use the trees growing within the belt; and that the several owners of the different closes enclosing the belt, never felled trees there, although they felled them in other parts of the same closes; and that when they made sale of their estates, the trees were never sold by their agents, because they were reputed and considered to belong to plaintiff and his ancestors, in which the several owners acquiesced. But here there was no continuity of the strip; on the contrary, it was entirely separated, and was at a great distance from the land to which the grants referred.—[*Parke, B.*—The question is, whether this may not be considered as one entire waste.]—But if the land claimed by this ejectment, must be supposed by the general presumption of law, to belong to Lord *Orford*, then there is no connexion proved between that land and the waste land in the manor; the general presumption of law is, that waste land, which adjoins the road, belongs to the owner of the adjoining enclosed land, and not to the lord of the manor. *Steel v. Prickett* (h), *Hollis v. Goldfinch* (i), *Doe, d. Pring v. Pearsey* (j). Here the defendant is without any evidence to destroy this presumption of law; and the acts of ownership exercised on the wastes of the manor are, therefore, totally irrelevant, *Tyrwhitt v. Wynne* (k). Another objection is, that some of the grants received in evidence, are merely of waste land in the manor, without stating where it was situated.

Biggs Andrews, for the defendant.—Here the land in dispute, and the waste land granted by the lord of the manor, are unquestionably in the same manor; and there is evidence that the lord's pound was once on the strip of land at the road side, which was connected with the spot where *Lingwood* built one of the cottages. The judgment of *Tindal, C. J.* in *Doe d. Barrett v. Kemp* (l), is very important. He says, "The contest was respecting the right to a slip of land between some old enclosures and the highway; whether it was vested in the owner of the adjoining freehold, or in the lord of the manor. It is well known that all grants of land are supposed to have come originally from the lord of the manor, as the grant to the lord is said to have come from the Crown; and the point to be ascertained is, whether the grantees of the lord enclosed to the edge of his grant, or left an interval between his enclosure and the boundary line of his grant.

Esch. Cham.

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(f) 7 Bing. 332.

(g) 14 East, 332.

(h) 2 Stark. N. P. C. 463.

(i) 1 B. & Cres. 205.

(j) 7 B. & Cres. 304.

(k) 2 B. & Ald. 554.

(l) 7 Bing. 334.

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If he enclosed less than the whole extent of his grant, and left an interval, the spot in dispute belongs to the plaintiff. If he enclosed to the extent of his grant, the interval in question belongs to the lord. It seems that the legal presumption is in favour of the grantees of the adjoining land; for when the lord claims the interval, he is commonly called on to shew acts of ownership to support his claim. Now, is evidence of that kind to be confined to the spot in question, or extended to acts on similar lands within the same manor? It seems that within the rule established by *Stanley v. White*, such extended evidence is admissible. Where the land is all within the same manor, and the question with respect to those unenclosed slips is the same throughout, namely, whether they formed part of the original grant from the lord or not, I see no ground why evidence of acts of ownership upon one part of such lands, should be excluded in a question of title as to another part. It is well known that in questions of right of common, evidence of feeding on any part of the common may be shewn. But enclosure is a much stronger act of ownership than feeding; why, then, should not evidence be admitted of acts of enclosure in other open places of the same manor? When we are interpreting the supposed original grants over the whole of the manor, why may we not inquire what has been done with the consent of the grantees in all other parts, as well as in the spot in question? If we were to reject such evidence, it might come to this; that though evidence might be forthcoming of enclosure of frontages by the lord in every other part of the manor, yet he might lose the spot in question, if the assertion of his right there had been accidentally omitted. In the present case, evidence of such acts, in places other than the spot in dispute, has been admitted up to a certain limit; but beyond that limit it has been rejected as to other places within the same manor. I think such evidence was admissible, and the rule for a new trial must be made absolute."—[*Patteson, J.*—In that case, the land ultimately terminated in a large common.]—That fact is certainly not stated in the present case, but all the premises are proved to be in the same manor; and the judgment delivered by C. J. *Tindal* contains the principle upon which the admission of the evidence can be supported. The present case is stronger than *Stanley v. White (m)*; and in *Tyrwhitt v. Wynne (n)* there was no evidence to connect the lands in the manor with the *locus in quo*; and *Hollis v. Goldfinch* was a case where the land was acquired under the provisions of an act of Parliament. There can be no question but that sufficient ground was laid, by the facts proved, to entitle the defendant to give the evidence.

F. Gunning, in the absence of Sir *W. Follett*, was heard in reply.—The grants in question were not evidence until some preliminary proof had been given to shew that the whole of the lands formed one property, belonging to one person, or held under one title; it was necessary to connect the lands on which cottages were built, in some way, with the lands included in the grants. In *Starkie on Evidence (o)* it is said, "Without preliminary evidence to shew that the whole of the lands formed one entire district, one property belonging to one person, or held under one title, such evidence of facts done in other places is inadmissible." Again, citing *Hollis v. Gold-*

(m) 14 East, 332.

(n) 2 B. & Ald. 554.

(o) 2 Stark. 822.

fack (p), he says, "In an action of trespass by canal proprietors, acts of ownership done by them in other parts of the canal are not evidence of the right of property in a particular branch of the canal, unless they shew that they are parts of one entire district."

Cur. adv. vult.

Arch. Chron.
Dor. decem.
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Lord DENMAN, C. J.—This is an ejectment brought to recover possession of two cottages, in the parish of *Gissing*. They were built on a small piece of land lying between the high road and an old enclosure belonging to Lord *Orford*, which was enclosed by a person of the name of *Lingford*, in the year 1806, mortgaged by him to the testator of the lessor of the plaintiff in 1809, and one of the cottages built by him in the year 1805, and the other in 1815. The defendant, who is lord of the manor, has possessed himself of them, alleging that they were built on the waste of the manor. It is contended by the lessor of the plaintiff, that the land belonged to the Earl of *Orford*, being a small slip between the enclosed land of Lord *Orford*, and the highway, on the general presumption, that land so situated belongs to the owner of the enclosed land in front of which it is situated.

The cause has been tried twice, the first time before Mr. Justice *Littledale*, when a verdict was found for the lessor of the plaintiff. The Court of *Common Pleas* granted a new trial on the rejection of evidence.

It was tried a second time before Lord *Lyndhurst*, and a verdict found for the defendant, but a bill of exceptions was tendered to some of the evidence which his lordship received for the defendant.

The case in the Court of *Common Pleas* is reported in 7 *Bingh.* 332, and 5 *Moore & Payne*, 173.

For the purpose of making out the title of the defendant upon the first trial, these facts are reported in *Bingham* to have been established:—That the road was skirted on both sides by slips of green, or waste land, from these cottages for several hundred yards, nearly up to a bridge where the old enclosures converged to the sides of the road, and the greens terminated in a point. That a few yards beyond the bridge the fences of the old enclosures receded again, and the road was again skirted by greens of the same description, which ultimately terminated in a large common; that, with the exception of the piece of land belonging to Lord *Orford*, between which and the high road, the cottages in question were built, the old enclosed land on both sides of the road from the cottages in question to within a few yards of the bridge, belonged to the defendant. The defendant, in order to support his claim, shewed various acts of ownership, exercised by him, from time to time, on the greens or waste lands by the side of the road, from the cottages in question up to the bridge; and then proposed to shew similar acts of ownership on the greens and wastes beyond the bridge, and in various other parts of the manor. The learned judge, however, refused to admit evidence of those acts beyond the bridge, the defendant being no further the owner of the adjoining enclosed lands; and conflicting evidence of acts of ownership over the spot in question by Lord *Orford*, and those under whom the lessor of the plaintiff claimed, being adduced on the part of the plaintiff, a verdict was found for him.

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The Court of *Common Pleas* were of opinion that the evidence ought to have been received, and granted a new trial.

It is to be observed that the evidence rejected, consisted of two parts; first, the acts done on slips of green on the road beyond the bridge, which is the continuation of the road on which the *locus in quo* was situated. Secondly, the acts done in other parts of the manor. The second trial took place before Lord *Lyndhurst*; and upon that trial evidence on both these heads was offered and received, and a bill of exceptions tendered, which has been argued before Lord *Denman*, Mr. Justice *Littleton*, Mr. Baron *Parke*, Mr. Baron *Bolland*, Mr. Justice *Patteson*, Mr. Baron *Gurney*, and Mr. Justice *Williams*.

The evidence consisted of grants or licences to enclose, made by the defendant, the lord of the manor, at the manor court, to six different persons: to *Clarke*, *Bolton*, and *Gilbert*, where the pieces of ground are described as in *Long-row Road*, which is in the road before mentioned as beyond the bridge, and distant two miles from the *locus in quo*; three other grants, to *Hunt*, *Harrison*, and *Spurden*, in which there is no description of their locality; they are merely called waste land, and are situated within the manor.

As to all the six, it was in evidence that they were lying between the land of other persons and the highway. It appears from the plan produced at the trial, which has been annexed to the bill of exceptions, that a space of sixty or seventy yards between the cottages in question and the bridge, is occupied by houses, which are described as old houses. It is not stated in the evidence reported in this case, as on the first trial, that the road by the sides of which these slips are situated, terminates in a large common. The question for our consideration is, whether all these grants of permission to enclose were admissible in evidence?

These grants were, we apprehend, the acts of ownership which were offered in evidence on the first trial, and rejected, and the new trial granted: the Court of *Common Pleas* being of opinion, as would seem from the report, that all of them ought to have been received. The ground upon which it has been contended by the counsel for the defendant, that they are admissible in evidence, is, that there was a unity of ownership, and a unity of character between the *locus in quo* and the several pieces of land which were comprised in those grants. That, adjoining to the *locus in quo*, an enclosure had been made by a person of the name of *Start*, on a slip in front of the defendant's own land, between that and the road, under a grant by the defendant, as lord of the manor; that grant reserving a small rent. That piece is called, in the grant, "*Pound Green*." That in continuity (though not in unbroken contiguity, because the bridge and the old houses intervene), there are slips of green for a considerable distance, more than two miles, upon various parts of which the lord of the manor has exercised acts of ownership, and that this affords strong presumption that the lord of the manor is the owner of all these slips of land. Further, that the other three pieces of land, for the enclosure of which grants of licences were made to *Hunt*, *Harrison*, and *Spurden*, being pieces of waste alleged to be lying between the lands of private individuals and the high road; there is in them a unity of character which will make these acts of ownership receivable in evidence. The judgment of the Court of *Common Pleas* appears to authorize the reception of all

those grants in evidence, but the opinion of the Court seems to have been given upon the supposition that all the pieces of waste, with respect to which evidence was given, lay on the sides of a road or roads, terminating in a large common, which upon this bill of exceptions we cannot assume.

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Upon the whole of the case, we think that there is a sufficient foundation laid to render the first three of the above-mentioned grants admissible, upon the ground that they are grants of parcels of one and the same waste or common, lying on both sides of the road, although the continuity of the waste is interrupted for a short distance by the intervention of the houses by the sides of the road.

It then remains to be considered whether the other three grants to *Hunt, Harrison and Spurden*, were admissible; and we are of opinion that they were not, even conceding that they were grants of parts of the waste, lying between a high road and the lands of private persons. All that these three grants shew is, that in some parts of this manor the lord has exercised acts of ownership over pieces of land which are denominated waste, but there is no proof whatever where those pieces were situate: they might have been many miles from the spot in question, wholly unconnected with it, parcels of large wastes, the soil of which was the undoubted property of the lord of the manor. The only unity of character between these parcels and the spot in dispute, is, that they lie within the same manor, and between private enclosures, and a public road, but we think there is not a sufficient foundation to let in evidence of acts of ownership over one of such parcels as proof of title to others. If the lord has a right to one piece of waste land, it affords no inference, even the most remote, that he has a right to another in the same manor, although both may be similarly situated with respect to the highway. Assuming that all were originally the property of the same person, as lord of the manor, which is all that the fact of their being in the same manor proves, no presumption arises from his retaining one part in his hands, that he retained another; nor if in one part of the manor, the lord has dedicated a portion of the waste to the use of the public, and granted out the adjoining land to private individuals, does it by any means follow, nor does it raise any probability that in another part he may not have granted the whole out to private individuals, and they afterwards have dedicated part as a public road. But the case is very different with respect to those parcels, which, from their local situation, may be deemed parts of one waste or common; acts of ownership in one part of the same field, are evidence of title to the whole; and the like may be said of similar acts on part of one large waste or common.

Upon the whole, therefore, we are of opinion the bill of exceptions must prevail, and that there must be a *venire de novo*.

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June 9th.

BRADSHAW v. SKILBECK, Administrator of MARY SKILBECK deceased.

Testator devised certain leasehold premises to his daughter for life, and from and immediately after her decease to her two eldest sons for their lives as tenants in common, and in case she should not have a son or sons to attain 21, and such sons dying without issue, then to all and every the daughters of his said daughter, their executors, administrators, and assigns, and if only one daughter, then wholly to that one, and to her legal representatives, with remainders over in case his daughter should die without issue: and he gave all the rest, residue, and remainder, of his estate to his daughter:—*Held*, that the daughter took an express estate for life, with a remainder to her two eldest sons for their lives as tenants in common, with the ultimate remainder, on certain contingencies to herself.

ASSUMPSIT on a promissory note for 103*l.* 13*s.* 9*d.* made by *Mary Skilbeck*, to the plaintiff in her lifetime. The declaration also contains counts for work and labour, and medicine, and for interest, and upon an account stated.

Plea.—That the plaintiff ought not to have or maintain his action, except as to the sum of 24*l.* 9*s.*; because the defendant fully administered all singular the goods and chattels of the said *Mary Skilbeck*, at the time of her death, and which had come to his hands to be administered, except the sum of 24*l.* 9*s.*; *Conclusion*, with a verification. Judgment was signed by default as to the 24*l.* 9*s.*; and the replication traversed the plea of *plea administravit*, upon which issue was joined; but the parties subsequently agreed under a judge's order, to state the following CASE for the opinion of the Court.

On the 1st of June, 1831, *Mary Skilbeck* made the promissory note mentioned in the declaration, which now remains in the plaintiff's hands unpaid; she was also at the time of her death, hereinafter mentioned, indebted to the said plaintiff, to the amount of 8*l.* 5*s.* 6*d.*, which likewise remains unpaid.

Mary Skilbeck was the only daughter of *Edward Hepworth*. *Edw. Hepworth* made the following will:—"This is the last will and testament of me, *Edward Hepworth*, of *Huddersfield*, made and published this 15th day of May, 1799, in manner following, that is to say; First, I appoint my good friend, *Robert Firth*, of *Huddersfield* aforesaid, *John Hirst*, and my daughter *Mary*, joint executors and executrix, and trustees hereof. Also I will that all my just debts, funeral expenses, and the charges in proving this my will be first paid and discharged by my said executors and trustees out of my personal estate. Also I give and bequeath all my leasehold buildings, lands and grounds, situate in *Huddersfield* aforesaid, and which I hold under Sir *John Ramsden*, bart. unto the said *Robert Firth* and *John Hirst*, to hold to them, their executors, administrators, and assigns, in trust, that they, or the survivor, or survivors of them, or the executors or administrators of such survivor, shall and do permit and suffer my daughter *Mary* to receive the rents and profits thereof, for and during the term of her natural life; and from and immediately after her decease, then I give and bequeath the same unto her two eldest sons, for and during the terms of their natural lives, as tenants in common, and not as joint tenants (if but one, then wholly to that one), but charged and chargeable if only one son, with the payment of 50*l.* each to the younger children which my said daughter may have; but if there should be two sons, then only with the payment of 20*l.* each to the younger children which my said daughter may have. But in case my said daughter *Mary* should not have a son or sons to attain the age of 21 years, and such sons dying without lawful issue, then I give and bequeath the same unto all and every the daughters of my said daughter *Mary*, their executors, administrators, and assigns; if only one daughter, then wholly to that one, and to her, or their legal representatives. But, in case my said daughter should happen to die without lawful issue, then I give and bequeath the same unto the two eldest sons of my brother *Daniel Hepworth*, for and during the

term of their natural lives, as tenants in common, and not as joint tenants, (if but one, then wholly to that one); and from, and immediately after his or their decease, then I give and bequeath the same unto their lawful issue. But in case my said brother *Daniel* shall not have any sons, or such son should not have lawful issue, then I give and bequeath the same unto all and every the children of my sisters *Ellen*, *Betty*, and *Ann*, and their legal representatives, as tenants in common, and not as joint tenants, and to their executors, administrators, and assigns, for ever: Provided, and my will and mind is, that my said trustees, or a majority of them, shall, so often as it is necessary, receive the rents, issues, and profits of all the above mentioned premises, for the purpose of renewing the lease or leases, and paying the fine due to Sir *John Ramaden*, or to the ground landlord, for the time being for the same. Also I give and bequeath unto *George Hepworth* and *Edward Hepworth*, two of the sons of my said brother *Daniel*, the legacy or sum of 10*l.* a piece, when, and as they attain the age of twenty-one years. Also I give and bequeath unto *Edward* and *Thomas*, two of the sons of my sister *Ellen*, the legacy or sum of 5*l.* each, when *Thomas* attains the age of twenty-one years; and I do direct that they shall receive lawful interest for the same, from twelve months after my father's decease. All the rest, residue, and remainder of my household furniture, goods, stock in trade, debts due and owing to me, and all other my real and personal estate whatsoever and wheresoever, I give and bequeath the same, and every part thereof, unto my said executors and trustees, but charged and chargeable with the payment of all my just debts, funeral expenses, charges in proving this my will, and the last-mentioned legacies of 10*l.* each, and 5*l.* each to my nephews. In trust for my said daughter *Mary*, so that the same may be at her own sole and separate disposal, when, and as she shall request the same."

The will also contained clauses, authorizing the executors or trustees to reimburse themselves out of the personal estate, all the charges and expenses incurred in the execution of the will and the trusts thereof, and declaring that they should not be accountable for the loss of any money which might have come into their hands, unless such loss had happened through their neglect or default, and that they should severally be answerable only for their own respective acts and deeds.

The above will was duly signed, published, and attested. The testator died in the year 1799. At the time of making his will, and also at the time of his death, he was possessed of a leasehold interest in the buildings mentioned in it, which is still subsisting. The will was duly proved by the executors and executrix named in it. *Mary Skilbeck* entered into possession of the leasehold property mentioned in the will, soon after the death of the testator, and continued in the possession of it until her death, as hereinafter mentioned. At the time of the making of her father's will, and also at the time of his death, she had two sons, *Edward* (the present defendant) and *Matthias*; after his death, she had a daughter, who died at the age of seven years, and two other sons, *John* and *Thomas*; the four sons all lived to attain their majority, but *Matthias* died in 1820, and *Thomas* in 1826; both intestate and unmarried. The husband of *Mary Skilbeck* died some time in 1814, before any of the sons had attained their majority, and she herself died on or about the 9th of *November*, 1833.

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The defendant, upon the death of his mother, took out letters of administration to her personal estate, and entered into the possession of the leasehold premises mentioned in the will of *Edward Hepworth*, and has from that time, until the assignment hereinafter mentioned, received the rents and profits to a considerable amount; he has also since that assignment continued in the receipt of the rents and profits of the premises.

John Hirst, one of the executors and trustees named in the will of *E. Hepworth*, died soon after the testator. *Robert Firth*, another of the executors, and the surviving trustee, died on or about the 1st *January*, 1828, leaving his son, *Thomas Firth*, his sole executor, who duly proved his will. The legal estate in the leasehold property comprised in the will of *Edward Hepworth*, became thus vested in *Thomas Firth*. By an indenture of assignment, dated the 11th day of *November*, 1834, and made between the said *Thomas Firth*, described as executor of *Robert Firth*, deceased, of the one part; and the defendant in this cause, described as administrator of his mother, *Mary Skilbeck*, deceased, of the other part; after reciting the will of the said *Edward Hepworth*, and that the said *Robert Firth* had survived his co-trustee, and in the exercise of his office, as such trustee, had some time in the year 1834, applied for and obtained from the said Sir *John Ramsden*, a renewal of the lease of the premises mentioned in the said will, and that the said *Thomas Firth*, after the death of his father, in like manner, in the exercise of his office of executor of his father, the said *Robert Firth*, had lately applied for and obtained a further renewal of the lease of the said premises, and that the said renewed lease was dated the 1st of *February*, 1834, and made between the said Sir *John Ramsden*, of the one part, and the said *Thomas Firth* of the other part, and thereby the said Sir *John Ramsden* demised to the said *Thomas Firth*, his executors, administrators, and assigns, the said premises mentioned in the said will, for the term of sixty years, from the first day of *May* then next, at the yearly rent of 16*l.* 10*s.*, subject to the covenants and provisions therein contained, and with the covenant of the said Sir *John Ramsden*, for the renewal of the said lease, at the expiration of twenty years, on payment of a fine of 33*l.* 4*s.*; or at the expiration of forty years, on payment of a fine of 166*l.*; and that the said *Thomas Firth* claimed to be entitled as such executor of his late father, to the repayment of 125*l.* paid and expended by his late father and himself, in procuring the said renewed leases, or otherwise, upon or about the said premises, and the execution of the trusts of the said will; and that the said *Edward Skilbeck* being entitled to the possession of the said leasehold premises, either in his own right, or as administrator of his said mother, the said *Mary Skilbeck*, deceased, had applied to the said *Thomas Firth*, to assign the same to him, which said *Thomas Firth* agreed to do upon payment of the said sum of 125*l.* It was witnessed, that in consideration of the sum of 125*l.* to the said *Thomas Firth*, in hand, paid by the said *Edward Skilbeck*, the receipt whereof the said *Thomas Firth* did thereby acknowledge, and did discharge the said *Edward Skilbeck*, and the said leasehold premises therefrom, he the said *Thomas Firth* did thereby bargain, sell, assign, transfer, and set over, remise, release, and quit claim unto the said *Edward Skilbeck*, his executors, administrators, and assigns, the said buildings, lands, and grounds comprised in the will of the said *Edward Hepworth*, with the appurtenances; to have and to hold the same unto the said *Edward Skilbeck*,

his executors, administrators, and assigns, from thenceforth, for and during all the residue and remainder then to come and unexpired, of the said term of 60 years, and for every renewed term of years to be granted thereof, as fully and effectually, to all intents and purposes, as the same had, at any time heretofore, been held and enjoyed, subject nevertheless to such covenants, payments, provisoes, and conditions, as were contained in the said lease; and also subject to the payment of 20*l.* a piece to the younger children of the said *Mary Skilbeck*, and to such of the trusts of the will of the said *Edward Hepworth*, as then remained unperformed. The lease of the property in question is of far greater value than the sum of 125*l.* paid by the defendant to *Thomas Firth* (supposing that sum to be a charge upon the lease), and the legacies of 20*l.* to each of the younger children of *Mary Skilbeck*, and other unperformed trusts of *Edward Hepworth's* will (if any). Administration has not been taken out by any person to the personal estate of *Matthias Skilbeck*.

The pleadings are to be as part of the case.

The 24*l.* 9*s.* assets confessed, are quite independent of any interest which *Mary Skilbeck* may have had at the time of her death in the leasehold property comprised in *Edward Hepworth's* will.

The questions for the Court are—

1st, Whether *Mary Skilbeck* (besides her life estate) took under the will of *Edward Hepworth* any, and what interest in the leasehold premises comprised therein, either directly, or through *Matthias*, as one of his next of kin; and 2dly, Whether such interest, or the rents and profits received by the defendant since the death of *Mary Skilbeck*, or any part thereof (taking into consideration the subsequent assignment of the legal estate to the defendant), form assets in his hands, as her administrator, so as to negative the plea of *plene administravit præter 24*l.* 9*s.** If the Court should be of opinion either that that interest, or those rents and profits, or any part thereof, form under the circumstances of this case, such assets, then it is agreed that the plaintiff shall recover his whole claim in the same manner as if he had succeeded upon the issue of *plene administravit præter 24*l.* 9*s.**; but if the Court shall be of a contrary opinion, then that the defendant shall have judgment in the same manner as if he has succeeded on that issue, and that in either case the judgment shall be entered in such form as the Court shall direct.

Cleasby, for the plaintiff.—As the bequest of the leasehold estate is to trustees “to permit and suffer” *Mary Skilbeck* to receive the rents for her life, it may be admitted that the legal estate in the premises was in the trustees (a). The question is, whether *Mary Skilbeck* had more than a life estate in the premises, for if she had the plaintiff is entitled to judgment. *First*, The sons took an estate for life only, as tenants in common, *Hinde v. Lyon* (b), *Pells v. Brown* (c), *Toovey v. Bassett* (d), *Bacon v. Hill* (e) *Lethieullieur v. Tracy* (f); therefore subject to that estate, *Mary Skilbeck* was absolutely entitled to the premises, under the devise of the residue of the testator’s real and personal estate. Upon the death of *Matthias*, his

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(a) See the cases collected upon this point in *White v. Parker*, ante, 112. Many cases were cited to show that the assets were nevertheless legal assets in the hands of the administrator, but it became unnecessary to determine that point.

(b) 3 Leon. 64.

(c) Cro. Jac. 590.

(d) 10 East, 460.

(e) Moore, 464.

(f) 3 Atk. 793.

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mother held one moiety absolutely, and one moiety subject to the life estate of *Edward*; and upon the death of *Mary*, the defendant having received all the rents, he is at least liable, as her administrator, for one moiety of the same, which are assets in his hands. *Secondly*, Admitting that *Mary Skilbeck* had only a life estate, and that *Edward* and *Matthias* took the premises absolutely, subject thereto; then, upon the death of *Matthias*, his mother was entitled to a distributive share of the premises, under the Statute of Distributions, and the produce of her share is assets in the hands of the defendant.

Wightman, for the defendant.—If *Mary Skilbeck* took more than a life estate under the will, we admit the plaintiff is entitled to recover. It was originally considered that a chattel interest could not be limited at common law; but afterwards it was held that it would be good by way of executory devise, *Lampet's case* (g); and if this demise had been to *Mary Skilbeck* for life, with remainder to the two sons, the whole term would have passed to the sons on the death of *Mary*. But here the will gives the estate over on failure of the issue of the sons, which is too remote, and therefore an estate tail is given to the sons. In support of this view of the case, the payment of 50*l.*, charged upon the estate, shews what the intention of the testator was. *Secondly*, *Matthias* died intestate, and without issue. His share of the premises would be liable, in the first place, to the payment of his debts, and then it would be distributed under the Statute.

But it does not appear that any administration has been taken out. He left two brothers surviving him, either of whom is entitled to take out administration; but as that has not been done, his share of the premises is not yet reduced into possession by his representative; and there can be no legal assets in the hands of the defendant arising from that source. The rule is laid down in *Shep. Touch.* 496, "All those goods and chattels, actions and commodities, which were the deceased's, in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor or administrator *doth get into his hands as duly belonging to him*, in the right of his executorship and administration," shall be said to be assets in his hand.

Cleasby, in reply.—It is now well settled, that limitations of chattels real are good, by way of executory devise, provided perpetuities are guarded against in the usual way. In *Fearne*, p. 404, it is said, "The cases I have adduced, are sufficient to shew the law to be now settled, that limitations over of chattels real, after a devise to one for life, are good as executory devises." *Manning's case* (h), *Lampet's case* (g). But the proposition, that the ultimate remainder in the premises was in *Mary Skilbeck*, has not been answered.

The payments in gross do not raise any presumption, for they are a charge upon the land itself, and not upon the devisee.

Cur. adv. vult.

June 17th.

TINDAL, C. J.—The decision of this case will turn upon the single point,

(g) 10 Rep. 47.

(h) 8 Rep. 187.

whether *Mary Skilbeck* took any interest in the leasehold property, bequeathed by the will of *Edward Hepworth*; beyond a life estate? for it has been properly admitted in the course of the argument, that if she took more than the life estate, the leasehold will be assets in the hands of the administrator, and judgment must be for the plaintiff. We are of opinion, that under the will of *Edward Hepworth*, *Mary Skilbeck* took an express estate for life, with a remainder to her two eldest sons, *Edward* and *Matthias*, for their lives, as tenants in common, with the ultimate remainder in the term, on certain contingencies, to herself; and that consequently, upon the death of *Matthias Skilbeck*, his mother, *Mary Skilbeck*, became absolutely entitled to his moiety for the remainder of the term.

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The real question is, whether the express devise for life to the two eldest sons, is enlarged by the words which follow into an estate tail; for if such is the case, it must be admitted, that they would take the whole interest in the leaseholds, and that any remainder over would be void. The words upon which that question has turned are these, *viz*:—"but in case my said daughter *Mary* shall not have a son or sons to attain the age of twenty-one years, and such sons dying without lawful issue, then I give and bequeath the same to her daughter or daughters: but in case my said daughter should happen to die without lawful issue"—then the testator devises it over. And we think it is clear, that these words do not import a giving over of the leasehold upon the general failure of issue of the two sons, which would be an estate tail, but a dying without issue under twenty-one. So that the event upon which the leasehold is given over, must happen within a period which can create no danger of a perpetuity. The cases cited on the part of the plaintiff, many of which are to be found collected in *Fearne on Contingent Remainders*, p. 470, &c. are sufficient authority to that point. In the event, therefore, which has happened, of *Matthias* dying without children, his moiety in the term came to his mother, either under the devise over, in case of the general failure of issue in her; or, at all events, under the residuary clause of the will.

As to the argument, that by reason of the charges contained in the will of certain sums to be paid to the younger children, the tenants for life must be presumed to take the whole interest, the answer has been properly given, that the charge is not imposed on the tenants for life, but on the property itself. We think, therefore, there must be judgment for the plaintiff.

Judgment for plaintiff.

ROBINSON and an^r Assignees of TATE, an Insolvent, v.
GLEADOW, BLUNDELL, HOLLINGWORTH and GLEADOW.

June 15th.

ASSUMPSIT by the assignees of one *Tate*, a lunatic insolvent debtor, against the defendants, as joint owners of two vessels, the *Freak* and the *Dapper*, to recover 46*l.* 12*s.* for premiums on policies of insurances, paid by *Tate*, under the following circumstances.

Where a ship broker generally employed an insurance broker to effect insurances on vessels, and

amongst others on vessels in which the ship broker was part owner, and the insurance broker charged all the premiums in a running account which he kept with the ship broker, and charged him for the amount, allowing him half commission:—*Held*, that the insurance broker might afterwards, on the bankruptcy of the ship broker, sue the other joint co-owners of his vessels (who had authorised the insurance) their names being unknown to the insurance broker when the insurance was effected, and no fraud or laches on his part being proved.

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Tate was an insurance broker at *Hull*; and *Hollingworth*, one of the defendants, was a broker and ship agent, carrying on his business at the same place; who, from time to time, employed *Tate* to effect insurances on various vessels, and a running account was kept between the parties. On the 18th of *April*, 1827, *Hollingworth*, in the course of his business, wrote to *Tate*, as follows:—"I am authorized by the owners of the several ships to put the following orders into your hands, and to have answers and policies on *Wednesday* next," and at the end of this letter, with similar instructions, relating to six other ships, were the following—

"3,500*l.* on the brig *Freak*, for twelve months. This ship is just launched and coppered, and is intended to be a constant trader to *New York* and *Hull*, &c.

"3500*l.* on the brig *Dapper*, for twelve months. This vessel is building for the owners of the *Freak*," &c.

A part of the demand sought to be recovered in this action, was for the premiums on the insurance effected on these two vessels, in pursuance of the foregoing order, which exemplifies the mode in which business was transacted between *Tate* and *Hollingworth*; and it was in evidence that they divided the commissions on all the insurances which were effected by *Tate*.

At this time *Hollingworth* and the other three defendants were joint owners of the *Dapper* and *Freak*, but their names were not known to *Tate* (a). The following facts were in evidence at the trial: that *Hollingworth* was managing owner of the two vessels, and kept the accounts, which were balanced, and the profits and losses ascertained and paid at the end of each voyage, and which accounts included the charges for insurance; and a copy of the accounts was given to each of the defendants:—That the parties were heard, at various times, to discuss the manner in which the ships should be insured, at *Hollingworth's* office which they were in the habit of frequenting; and that they continued co-owners of the *Freak* and *Dapper*, up to 1833.

Tate debited *Hollingworth* for all the insurances which were effected by his orders, allowing him a proportion of the commission he received. In *March*, 1828, *Tate* became insane, and in the course of that year certain parties who had undertaken to arrange his affairs, delivered a general account to *Hollingworth*, of the balance due from him to *Tate's* estate, of which they required payment, and which included the premiums paid on the *Freak* and the *Dapper*; but in consequence of the unsettled state of *Tate's* affairs, no further proceedings were taken until the 19th of *May*, 1831, when *Tate* having been discharged under the Insolvent Debtors' Act in *November*, 1830, his assignees commenced an action against *Hollingworth*, to recover the before-mentioned balance of his general account; but *Hollingworth* having suspended his payments in the same month of *May*, the assignees afterwards commenced the present action against the defendants.

At the trial before *TINDAL*, C. J., the learned judge left it to the jury to say, *First*, Whether a joint authority had been given by the other defendants to *Hollingworth*, to order the insurances effected by *Tate*; and *Secondly*, Whether the *Gleadows* and *Blundell* had been discharged by any thing which had occurred since the orders were given; and his lordship remarked

(a) It was contended for the defendants, that there was evidence that *Blundell* and

Hollingworth were known to *Tate* as two of the part owners.

that between *March*, 1828, and *November*, 1830, *Tate* was unrepresented, as no person had any legal authority to act for him.

Verdict for the plaintiff.

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In *Easter Term*, *Creswell* obtained a rule nisi, for a new trial upon two grounds, *First*, That the verdict was against evidence; *Secondly*, For misdirection, because the learned judge had not left it to the jury to say, whether *Tate* had so elected and made *Hollingsworth* his debtor, as to release the other defendants. *Creswell* questioned the authority of *Thomson v. Davenport (b)*.

Maule, and *R. V. Richards*, shewed cause.—The four defendants were co-owners and partners in the traffic, which was carried on by means of the ships upon which the insurances were effected. In most of these cases, the co-owners are also partners, and the same rules apply as to cases of co-partnership. This is not a case of principal and agent, like *Thomson v. Davenport (b)*, but if it was, the doctrines there advanced have never been judicially overruled by any subsequent decision of the Court. Lord *Tenterden* there laid down the general rule as follows :—" I take it to be a general rule that if a person sells goods (supposing at the time of the contract he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing, is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal." And his lordship afterwards observes, " The present is a middle case; at the time of the dealing for the goods, the plaintiffs were informed, that *M'Kane*, who came to them to buy the goods, was dealing for another, that is, that he was an agent; but they were not informed *who* the principal was. They had not therefore, at that time, the means of making their election. It is true that they might, perhaps, have obtained those means, if they had made further inquiry; but they made no further inquiry; not knowing who the principal really was, they had not the power, at the instant, of making their election. That being so, it seems to me that this middle case falls, in substance and effect, within the first proposition which I have mentioned." Now suppose *Hollingsworth* had said to *Tate*, I am authorized, as agent, by my co-owners, to make these insurances; there can be no doubt that the owners might be sued, if their names were subsequently discovered: and this case falls directly within that principle; and the fact that *Hollingsworth* was co-owner as well as agent, makes the case stronger in favour of the plaintiffs. And here it is clear upon the evidence, that *Tate* did not know the names of all the owners when the insurances were effected. The joint authority to insure, having therefore been proved to the satisfaction of the jury, this verdict can be sustained upon the principle, which is now well established.

Creswell, *Alexander*, and *Martin*, *contrâ*.—Part owners of a ship are not necessarily partners, *Helme v. Smith (c)*, and therefore the plaintiffs were bound to shew that *Hollingsworth* had authority to effect the insurances, otherwise they were not liable. *Thomson v. Davenport (b)* did not meet with the

(b) 9 Barn. & Cres. 78.

(c) 7 Bing. 709.

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approbation of many eminent members of the bar at the time it was decided. It is immaterial whether *Tate* knew the names of the part-owners or not, if he elected to make *Hollingworth* his debtor; *Paterson v. Gandasequi* (d), and *Addison v. Gandasequi* (e), fully support that proposition. And here the evidence shews that *Hollingworth* was always treated as the debtor until he became insolvent, and then the plaintiffs turned round, and brought the present action. The jury ought, therefore, to have been asked, whether the credit was not given to *Hollingworth* alone? there is not the least evidence to shew that any contract was made by *Tate*, with the other co-owners of the ships. *Reed v. White* (f) was an action against co-owners of a ship, for cordage supplied for the use of the ship, to one *White*, one of the owners, who acted as ship's husband. The plaintiff took *White's* bill for the amount, and the bill being dishonoured, after a renewal, the action against all the owners was brought. It was then contended that the plaintiff had discharged the defendants; and Lord *Ellenborough* said:—"The first renewed bill is expressed to be for cordage, found for the *Princess Mary*, and drawn only on *White*. If this was drawn on him as for himself, and as agent for his partners, it was a prolongation of time as to all. The question is, whether it was intended as a settlement with him alone, and adopting him as the single debtor." So here the question was, whether credit was given to *Hollingworth* alone.—[*Tindal, C. J.*—This point was not suggested to me during the summing up: I think it was involved in the other point which I put to the jury.]—The manner in which the accounts were kept by *Hollingworth*, and their settlement, were very material circumstances, to shew that the defendants ought not to be charged in the present action. In *Thomson v. Davenport* (g), Mr. J. Bayley says, "If the agent does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he shall not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, on such a state of accounts, would be an answer to the action brought by the seller, where he had looked to the responsibility of the agent." Mere carelessness, without fraud on the part of *Tate*, would be sufficient to relieve the co-owners, *Robinson v. Wilkinson* (h), where it is said by Mr. J. Graham, "A party has always a right against a concealed partner, of whom he has previously no knowledge, as soon as he discovers him, unless that ignorance were his own fault, or if he had not used due diligence in finding him."

Cur. adv. vult.

PARK, J.—It is admitted in this case that the four defendants were part owners of the two ships in question, and that *Hollingworth* was managing owner. Now it is quite clear that the ship's husband, or managing owner of a ship, has no right to insure for his co-owners, without an authority from them, which may be express or implied, *French v. Backhouse* (i): there Lord *Manfield*, and some of the other judges, held it to be sufficient to

(d) 15 East, 62.

(e) 4 Taunt. 574.

(f) 5 Esp. N. P. C. 22.

(g) 9 B. & Cres. 88.

(h) 3 Price, 544.

(i) 5 Burr. 2727.

make the co-owners liable for the premiums, if they were told of the insurance, and expressed no objection to it.

The question in this case is, Had *Hollingworth* a joint authority from his co-owners to make the insurance? and the jury found that there was a joint authority; and it seems to me that they were well warranted in so doing, for I have examined the notes of my Lord Chief Justice; and there appears to have been abundant evidence that the other part-owners were constantly coming to *Hollingworth's* counting house, where they examined the books and accounts; and the insurances were made for their joint benefit, and on their account, and no objection was ever raised by them; the case therefore comes within Lord Mansfield's doctrine, that they were well informed of what was done, and made no objection. The maxim—*omnis ratihabitio retrotrahitur et mandato priori equiparatur*—well applies to this case; for the insurance was made for the joint benefit of all, and there was no concealment of the matter, for the parties had full opportunities of seeing the books at all times. In *Helme v. Smith (j)*, it was held, that a part-owner of a ship is not necessarily a partner, unless the parties had laid out money on speculation, the proceeds to be divided on the ship's return, in which case they would be partners in every sense, and this distinction is there expressly taken. *Paterson v. Gandasequi (k)* has been relied on; but that case does not militate against the present decision; and it was sent back again for a new trial: but although I was counsel in it I do not recollect what became of it. Another case against the same defendant, was tried about the same time, *Addison v. Gandasequi (l)*, and the Court was there clearly of opinion that the principal was not liable, where the plaintiff made the agent the buyer by debiting him in his books, and not requiring any guarantee from the agent. But, at all events, those were cases between principal and agent, and the fallacy in the argument for the defendants is, in calling *Hollingworth* a mere agent, whereas this is a case of joint authority.

I think the question, whether *Tate*, by his mode of dealing with *Hollingworth*, released the other co-partners, does not arise. I can find no evidence to lead to such a conclusion; if any fraud had appeared, or if the settlement of the accounts between the co-owners had been brought to the knowledge of *Tate*, it might have made a difference in considering the question.

Then it is objected that it was not fully put to the jury, whether *Hollingworth* was alone debited. I have no doubt but this would have been done, if his lordship's attention had been called to it; but if it had been, I am satisfied that it would not have been of any avail; for the joint authority and joint benefit in the insurance was established, and that decided the question; nor was there any doubt but that these four defendants were all special partners in the adventures in which these ships were engaged. I therefore think this rule must be discharged.

CASELEE, J.—I am of the same opinion. It is quite clear that there was a partnership between the defendants as to these voyages. Some of the correspondence shews that *Tate* knew that there were other owners of the vessels, but not that he knew who they were. He could not therefore exercise any right of election. It appears that *Tate* became insane in less than twelve months after these transactions occurred: if he had been in

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(j) 7 Bing. 709.
(k) 15 East, 62

(l) 4 Taunt. 374.

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circumstances to interfere, and had lain by for an unreasonable period, the case might be different.

VAUGHAN, J.—This is an application entirely to the discretion of the Court; and although the cause has been tried twice, I would send it down for a new trial, if I could see that justice had miscarried by the fault of the jury. The question really is, whether the orders for the insurance were given to *Tate*, by the joint authority of the part owners of the vessels. The argument for the defendants has been put upon the grounds, *First*, that this was a transaction between principal and agent, where the principal was not known at the time the contract was made. The law upon this subject is well established, and I have read *Thomson v. Davenport* (m), which has been impugned in argument, with attention. It is there laid down, that the seller of goods may maintain an action against a principal, whose name was unknown at the time of the sale, although the seller had, in the first instance, debited the party who purchased the goods. But, in truth, this is a question not between principal and agent, but between joint contractors; and that was the point which was left to the consideration of the jury. It was in evidence that the defendants came to the counting house of *Hollingworth*, sometimes together, and sometimes separately; and I agree, that one part-owner has no implied authority to bind the others; but here there does not seem to be any doubt but that the insurance was made by the joint authority of the co-owners. *Secondly*, As to the point which it is said should have been left with the jury, I do not think it would have made any difference in the case. There is no ground for any imputation of fraud in this case, and the jury had the whole evidence before them, and I think they have come to the right conclusion.

TINDAL, C. J.—I have little to add to what has already been said, as I concur entirely with the opinions which have been expressed.

The jury have found by their verdict that the four defendants were joint contractors, and that they concurred in the traffic in which the ships were engaged, when these insurances were effected. But it is objected that it was not left to the jury to say whether the credit was given to *Hollingworth* alone. This point should have been suggested to me at the trial, if the defendants had wished to have it decided; but if I had left it with the jury, it would have been with this observation, that there was no evidence that *Tate* knew who the other owners of the vessel were, and that there could be no election until he knew. *Secondly*, it is objected, that the summing up was too narrow, as to the question whether *Hollingworth's* co-owners were not discharged by *Tate's* subsequent conduct; but the moment you fix four persons as being joint contractors, it is very difficult for them to relieve themselves afterwards, or to shew that any one of them is not liable. The case of *Lodge v. Dias* (n) shews how difficult it is to obtain a release from a joint contract after it is once established. In the present case I see no reason for supposing that there were any laches on the part of the plaintiffs, much less that there was any fraud on the part of *Hollingworth*. As to *Tate*, he became insane, and I think all the cases sanction us in discharging this rule.

Rule discharged.

(m) 9 B. & C. 78.

(n) 5 B. & Ald. 611

PIERCE v. FOTHERGILL.

Com. Pleas.

June 16th.

ACTION on a promissory note for money lent, payable on demand. At the trial, damages were given for the amount of the note, and for interest from August 1, 1833, the day of its date.

A rule having been obtained to reduce the damages by the amount of the interest,

Talfourd, Serjt., and *Steer*, shewed cause.—The jury were entitled to give interest by way of damages, *Nichol v. Thompson* (a); *Harrison v. Allen* (b); *Bruce v. Hunter* (c); *Calton v. Bragg* (d).—[*Tindal*, C. J.—Suppose a note is payable on presentment, no interest could be claimed until after it had been presented. So here it is payable on demand, *non constat*, the party would not have paid upon demand.]—Then the issuing of the writ of summons is tantamount to a demand, and interest may be given from that time.

In an action on a promissory note payable on demand, the jury cannot give interest, except from the time a demand of payment is made. The issuing of a writ of summons is a sufficient demand.

Heaton, *contrd.*—The declaration does not contain a count for interest.—The old practice of proceeding by *latitat* may amount to a notice to the party that the action is brought, but now the declaration only seeks to recover what is due at the time it is delivered.

TINDAL, C. J.—I do not think the distinction is correct which has been taken between the *latitat* and the writ of summons, for the *latitat* always complained of some imaginary grievance, which was not explained to the defendant; and the issuing of the summons gives the defendant notice that there is a demand made upon him, and he may pay the money into court if he thinks fit. The rule must be made absolute to reduce the damages so as to compute the interest from the time of issuing the writ of summons.

The other judges concurred.

Rule absolute accordingly

(a) 3 Taunt. 157.
(b) 2 Bing. 4.

(c) 3 Campb. 467.
(d) 15 East, 223.

LEONARD v. SIMPSON, Executor of STEPHEN SIMPSON, deceased. June 17th.

DEBT on a judgment recovered against the defendant, as executor of *Stephen Simpson*, deceased, with a suggestion of a *devastavit* in the declaration. *Plea*:—that the defendant had not wasted the testator's goods, &c., and issue thereon. At the trial before *Vaughan*, J., at the Sittings for

1. In debt on a judgment recovered by *devastavit* against an executor, the roll of proceedings in the original action shewing a return of *nulla bona* by the sheriff to the writ of *fi. fa.* issued to recover the debt *de bonis testatoris*, and a levy of the costs *de bonis propriis*, is sufficient *prima facie* evidence of a *devastavit*.

2. Where a *testatum fi. fa.* appeared on a judgment roll to be founded on an irregular writ of *fi. fa.*, held, that after the *testatum* writ had been executed without any application made to set it aside, no objection could be raised upon an action being brought on the judgment.

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Middlesex after last *Hilary Term*, the plaintiff put in evidence the judgment roll in the original action, which set out the proceedings to the following effect:—*Venue, London*; the action in covenant for the arrears of an annuity due from *Stephen Simpson* to the plaintiff; that the defendant had allowed judgment to go by default; the issuing of a writ of inquiry to the sheriffs of *London*, with an award of 73*l.* damages, and 20*l.* for costs, to be levied on the goods of *Stephen Simpson*, at the time of his death, in the hands of the defendant to be administered, and if he had not so much thereof in his hands to be administered, then 20*l.* parcel thereof of his the defendant's own proper goods.

—That a *fi. fa.* was directed to the sheriff of *London*, and that the sheriff (a), “to wit, *William Holland*, sheriff of the city aforesaid,” returned that the said defendant had no goods which were of the said *S. Simpson* at the time of his death to be administered, and that the sheriff had not any of the goods of the defendant in his bailiwick whereof he could levy the 20*l.*, &c.; That the plaintiff had prayed a writ of *testatum fi. fa.* to be directed to the sheriff of the said city of *Litchfield*, which was granted. That *William Holland*, sheriff of the city of *Litchfield*, thereupon returned that he had levied 20*l.* of the defendant's goods, but that the defendant had no goods in his bailiwick which were of *S. Simpson*, deceased, at the time of his death in the hands of the defendant to be administered.

It was objected for the defendant at the trial, that the mere return of *nulla bona*, made by the sheriff to the *testatum fi. fa.* was no evidence of a *devastavit*; also that the writ was irregular, it being founded upon a *fi. fa.* directed to the sheriff of *London*, which was manifestly incorrect, as the Court would take judicial notice that there were two sheriffs of *London*. Verdict for the plaintiff, with leave reserved to move for a nonsuit on the above points.

Butt obtained a rule *nisi* accordingly.—The *testatum fi. fa.* is irregular, because it is founded upon the *fi. fa.* which is said to have been directed to the sheriff of *London*, and there ought to have appeared a regular return of that writ by the sheriffs, or the Court cannot be satisfied that there are not assets of the testator still in *London*. Secondly, Admitting the record to be free from objection, the writs and returns are not sufficient evidence of a *devastavit*. In *Erving v. Peters* (b), where all the authorities are collected, the return of the sheriff to the writ of execution is not only that the testator had no goods within his bailiwick, but also that the defendant had “sold, eloiigned, and wasted divers goods and chattels of the testator, to the amount in value of the debt and damages.”

Cowling shewed cause.—It will not be denied that the defendant, by suffering judgment to go by default, has admitted that he had assets in his hands; the only question is, whether there has been sufficient evidence to shew a *devastavit*? And First, No evidence was necessary. The issue to be tried lies substantially on the defendant. The action is founded on the judgment recovered against him, 1 *Saund.* (c); and the defendant having admitted that

(a) This was evidently an accidental insertion of the sheriff of *Litchfield* instead of the sheriffs of *London*.

(b) 3 T. R. 686.

(c) 1 Will. Saund. 219. b.

he has assets, it is his duty to apply them in discharging the judgment debt, and if he neglects to do so, that is a *devastavit*. The defendant may have proved that he shewed the assets to the sheriff, or that after plea, and before judgment, he confessed judgment to another, or that judgment was not docketed, 1 *Saund.* (d).

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A *devastavit* is an inference of fact which the law raises from the judgment and other facts, as a promise is implied in an action of assumpsit. It would be almost impossible, in many cases, to prove an actual *devastavit*; *ex. g.* the assets may consist of money in the executors' hands. At all events, the plaintiff will not be required to issue writs of execution into every county in England, or to file a bill of discovery in equity against the defendant. Then it is said that the sheriff ought to have returned a *devastavit* to the *fi. fa.*; but *Glossop v. Pole* (e) shews that he would do so at his own peril, and he could not be compelled to do so. All the authorities shew that it is sufficient to set out the writ of execution and the return of the sheriff on the declaration, and the record is sufficient evidence to prove the case, *Wheatley v. Lane* (f); *Skelton v. Hawling* (g); *Challenor v. Challenor* (h); *Hope v. Bague* (i).

Secondly, The evidence offered at the trial was sufficient, and the sheriff need not return a *devastavit*. In *Wills. Saund.* 219, a, it is said, "If the sheriff cannot find any assets, he may, if he pleases, return a *devastavit* as well as *nulla bona* to the writ of *fi. fa.*" In *Blackmor v. Mercer* (j), Hale, C. J., said, the goods might have been kept so secretly that the sheriff could not find them. The return to the *fi. fa.* may be voidable, and the *testatum fi. fa.* therefore irregular, and perhaps it might have been set aside; but that has not been done, and it is too late to take the objection; the issuing of it is altogether a matter of form. But here the *testatum fi. fa.* is actually executed, and some of the defendant's goods are seized under it, and yet he does not inform the sheriff what has become of the testator's assets (which he has admitted came to his hands), the demand and refusal is therefore *prima facie* evidence of a *devastavit*.

But, in support of the rule.—*Wheatley v. Lane* (k) was decided upon an objection which was taken by demurrer to the form of the declaration, and it does not decide what is sufficient evidence of a *devastavit*. It may be admitted that a judgment by default is an admission of assets, but no authority goes so far as to hold that it is also an admission that the goods have been wasted. Actual proof of a *devastavit* has always been required. In *Rock v. Leighton* (l) the sheriff returned a *devastavit*; also in *Erving v. Peters* (m). In *Wharton v. Richardson* (n) a *devastavit* was found upon a *scire fieri* inquiry. In *Hope v. Bague* (i) it was proved that a simple contract creditor had been paid by the defendant, which was some evidence of a *devastavit*.—[*Tindal*, C. J.—The plaintiff could not compel the sheriff to return a *devastavit*.]—If the argument on the other side should prevail, the plaintiff need only issue a writ of *fi. fa.* into some distant county, obtain a

(d) 1 Wms. Saund. 219, a.

(e) 3 M. & S. 175.

(f) 1 Wms. Saund. 216.

(g) 1 Wilson, 258.

(h) Cited in 1 Wilson, 259.

(i) 3 East, 2.

(j) 2 Wms. Saund. 202, a.

(k) 1 Wms. Saund. 216.

(l) 1 Salk. 309.

(m) 3 T. R. 686.

(n) 2 Strange, 1074.

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return of *nulla bona*, and then the executor would be chargeable *de bonis propriis*. If the *fi. fa.* issued in *London* is merely a matter of form, assets of the testator may now be there sufficient to satisfy the debt. The rule of law upon this subject is already very hard against an executor, as was said by Lord *Kenyon* in *Erving v. Peters* (o), and the Court will not raise so violent a presumption as that if an executor allows a judgment to go by default, he therefore admits that he has been guilty of a *devastavit*.

Cur. adv. vult.

TINDAL, C. J.—The short point in this case is, whether such evidence of a *devastavit* was given at the trial on the part of the plaintiff as, being unanswered by the defendant, entitles the plaintiff to a verdict; and we think the evidence was sufficient for that purpose. The judgment by default in the former action is conclusive upon the defendant that he has assets to satisfy the judgment. This is so thoroughly settled in *Rock v. Leighton* (p) and in other cases which had preceded it, that it was admitted to be the law by the defendant's counsel in arguing the case of *Erving v. Peters* (q). The fact therefore is conclusively established against the defendant that he has assets of the testator in his hands; and the only question which remains is, what evidence is necessary to shew that he has wasted those assets? In reason and good sense very little evidence ought to be necessary for that purpose. It is his duty, when called upon by notice or by a writ of execution, either to satisfy the debt out of the moneys of the testator, or to shew the assets to the sheriff, that he may make the debt out of them; and accordingly very slender evidence has at all times been held to be sufficient to prove the *devastavit*. The issuing of a writ of *fi. fa.* directed to the sheriff of the county where the action was laid, and a return of *nulla bona* thereto, has for a long time past been deemed evidence enough; and yet, if the reason of the thing be considered, the suing out and return of such writ unto the county where the action is laid, affords no necessary presumption that the defendant has ever heard of it, for it is a mere fiction of law to suppose the defendant resident in the county where the *venue* is laid in a personal action. And even if he be, the sheriff would, as a matter of course, return *nulla bona* to the writ, unless authentic information was given to him where the testator's goods were to be found, and they were exposed to his officers; and before the present practice prevailed of issuing a *fi. fa.* and returning *nulla bona* thereto, it was usual for the sheriff to summon an inquest of office, and to return a *devastavit* in addition to his return to the writ of *fi. fa.*, which being an *ex parte* proceeding, gives no notice whatever to the defendant. In the present case, the plaintiff sued out a *testatum fi. fa.* to the sheriff of *Litchfield*, with a return that the sheriff had caused to be levied the costs *de bonis propriis* of the defendant, and that the defendant had no goods or chattels of the testator in his hands to be administered. Now it must be admitted, that the *testatum fi. fa.* in this case was irregular, inasmuch as it proceeds upon the suggestion of an award of a writ of *fi. fa.* to the sheriff of *London*, whereas the Court must take judicial notice that there are *two* sheriffs, and not one only; but the *testatum fi. fa.* is irregular only; it is not a nullity. And if the plaintiff had applied to amend the

(o) 3 T. R. 688.

(p) 1 Salk. 310.

(q) 3 T. R. 685.

recital, no doubt such amendment would have been permitted, and no objection could have then been taken to the *fi. fa.* But the question is, as the *testatum fi. fa.* has been actually issued and returned, and no objection taken against its irregularity, whether such return, that the sheriff has actually levied the amount of the costs out of the proper goods of the defendant, and that there are no goods of the testator within his bailiwick, does not afford more satisfactory evidence that the defendant had notice of the claim so as to call upon him to pay the debt, or offer the goods of the testator to the sheriff, than if a *fi. fa.* had been returned in the ordinary course, *nulla bona*, by the sheriff of the county where the action was brought? And we feel no doubt that such is the case, and that the defendant was called upon at the trial, after the production of the *testatum fi. fa.* and return, to shew that he had not wasted the goods of the testator, but was ready to give them to the sheriff, so that it was the sheriff's fault that he did not make the debt out of them. And as no such evidence was offered by the defendant at the trial, we think the plaintiff's evidence sufficient to establish a *devastavit*.

We therefore think the rule for entering a nonsuit should be discharged.

Rule discharged.

NICHOLLS v. LE FEUVRE.

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June 2d.

TROVER. *Pleas*.—1st, Not guilty; 2d, That plaintiffs were not, at the time of the conversion, entitled to the property and possession of the goods and chattels in the declaration mentioned.

At the trial before *Tindal, C. J.*, at the *London* Sittings, it was in evidence that the defendant was a general agent at *Southampton*, and that he was employed by one *Le Couteur*, a draper, residing in *Guernsey*, as his agent, to forward to him at *Guernsey* all goods which arrived at *Southampton* directed to him. The defendant acted under a general authority from *Le Couteur*, dated *August, 1830*, which directed him to take charge and forward all goods which might arrive at *Southampton* for *Le Couteur*, whether they were directed to the care of the defendant or not;—and the course of business, was that as soon as any goods arrived, the defendant paid the carriage and custom-house fees, and shipped them to *Guernsey* by a vessel which he selected. On the 7th of *May, 1834*, the plaintiff forwarded a quantity of goods, directed to *Le Couteur*, to the care of the defendant at *Southampton*, and about the same time one *Coates*, a merchant in *London*, forwarded another parcel with a similar direction. The first parcel arrived at *Southampton* on the 10th of *May*, and the second on the 14th, on which day the parcels were shipped by the defendant in the usual manner. At this time *Le Couteur* was in *London*, and, being arrested for debt, he wrote on the 14th of *May* to the defendant, and desired him not to forward the goods; and *Coates* having also notice of the arrest, left *London* the same day, and reached *Southampton* the following morning to stop his goods. *Coates* ascertained on his arrival that his goods were shipped, but that the vessel had not sailed. *Coates* then requested the defendant's clerk, in the absence of his master, to have the goods relanded; and the clerk, admitting that he had re-

A. residing in Guernsey, employed the defendant as his agent at Southampton, to ship all goods which arrived there directed to A. The defendant paid the carriage and the wharfage dues, and selected the ship by which he forwarded the goods:—Held, that the transit of the goods was not ended at Southampton, and that the vendor might stop them after they had been put on board a vessel for Guernsey.

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ceived the letter from *Le Couteur* desiring him not to forward the goods, wrote the following request to the proper authorities at the custom-house:—

"Gentlemen,

"Southampton, 15th May, 1834.

"I beg leave to ask permission to be allowed to reland twelve packages marked *I. L. C.*, 1 to 12, shipped by me the 14th inst., on board the *Princess Charlotte*, *I. Le Hiver* master, for *Guernsey*, having received instructions from the owners to stop the shipment for the present, and await his directions.

"I remain, &c.

"Per. *Wm. I. Le Feuvre*.

"*D. D. Le Boutillier*."

The goods were all afterwards relanded, and *Coates* seeing the plaintiff's goods on board, ordered them to be landed also, although he was not authorized to stop them; the defendant's clerk consented to place all the goods in his master's warehouse, saying that they should there await the orders of the *London* houses. *Le Couteur* was subsequently made a bankrupt, but his assignees claimed no right to either of the parcels of goods; but the defendant set up a right of lien upon them for the balance of his general account with *Le Couteur*. He was tendered his charges incurred upon the plaintiff's goods before the action was brought.

Upon these facts it was objected at the trial—*First*, That the *transitus* of the goods was at an end at *Southampton*. *Secondly*, That the plaintiff's goods were stopped without his authority.

The learned judge reserved leave to the defendant's counsel to move the Court upon these points, and left two questions to the jury—*First*, Whether the *transitus* was at an end at *Southampton*. *Secondly*, Whether the goods had not been relanded by the defendant to await the orders of the plaintiff. The jury found for the plaintiff on both these points.

Sir *W. Follett* obtained a rule *nisi* to enter a nonsuit. The cases he referred to are mentioned in the argument.

Bompas, Serjt. shewed cause.—This is not a question between the assignees of a bankrupt and the vendor, but it is whether the defendant has a right to set up a lien on the goods, the assignees claiming no title whatever. The defendant was a mere agent to forward the goods, and it was necessary that some person at *Southampton* should make proper entries at the custom-house. *Guernsey* was the destination of the goods, as the direction which was attached, expressed, and until they arrived there the *transitus* was not at an end. All the cases cited on the other side by Sir *W. Follett*, had some peculiar circumstances attending them. In *Ellis v. Hunt* (a), the goods were attached whilst they were in the custody of the carrier, by a writ from the *Lord Mayor's Court*; and the assignee of the consignee had put his mark upon them, which determined the *transitus*. In *Dixon v. Baldwin* (b), the goods remained in the warehouse waiting for orders from the vendee as to their ultimate destination, and they were to receive a new direction, and not to be forwarded as a matter of course. In *Rowe v. Pickford* (c), the vendee used

(a) 3 T. R. 464.
(b) 5 East, 174.

(c) 8 Taunt. 84.

the warehouse as a place of final delivery, therefore the *transitus* was at an end. And in *Foster v. Frampton* (d), the vendee took samples of the goods, and desired the carrier to keep them until further orders were given. But the general rule which decides the present case, is laid down in *Coates v. Railton* (e). There goods were purchased for *Butler* and Co., to be forwarded to them at *Lisbon*, and the defendant, who resided at *Manchester*, received the goods from the vendors and forwarded them to *Lisbon*, and it was held that the *transitus* continued until they reached *Lisbon*. Lord *Tenterden*, C. J., there said, "The goods in question were purchased of the plaintiffs by the defendants, as agents, in the name of *Butler, Brothers*, but in fact for *Butler, Krus*, and Co., to be sent to the latter at *Lisbon*. The defendants were packers and warehousemen, as well as the general agents of the purchasers. If they had been mere warehousemen, it is quite clear that as the goods were purchased of the vendors, to be sent to *Lisbon*, the latter would have had a right to stop them, so long as they were in a course of conveyance to *Lisbon*. I thought that the fact of the defendants in this case having been the general agents of the purchasers as well as warehousemen, did not make any difference; and the goods having been delivered to them by the sellers for the purpose of being forwarded to *Lisbon*, the *transitus* in this case was not at an end, and that the plaintiffs had a right to stop them." This principle has been acknowledged in many cases, and if the goods are in the hands of a carrier or other person, it becomes that person's duty to retain them after notice from the vendor, before the *transitus* is at an end, otherwise he is guilty of a tort; *Stokes v. De La Riviere* (f), *Hunter v. Beale* (g), *Mills v. Ball* (h). As to the stoppage of the goods by *Coates*, it was sufficient. The defendant agreed to reland the goods, and to deposit them in his warehouse, there to await the orders of the owners; and this fact has been found by the jury. Having done so, the defendant cannot now dispute *Coates's* authority, which has been subsequently affirmed by the plaintiff.

Sir *W. Follett* and *Bingham*, *contrâ*.—The *transitus* was at an end when the goods reached *Southampton*. The general authority of *August*, 1830, gave the defendant the control of all goods directed to *Le Couteur*, which arrived at *Southampton*. The rule of law is, that whilst goods are passing to their destination, the vendor may stop them; but if they once come into the custody of a person who has a right to exercise a control over them, the *transitus* is at an end. *Hunter v. Beale* (g) has been relied on for the plaintiff, but Lord *Mansfield's* doctrine in that case was repudiated by Lord *Ellenborough* in *Dixon v. Baldwin* (i), he says, "As to *Hunter v. Beale*, in which it is said that the goods must come to the corporal touch of the vendees, in order to oust the right of stopping in transitu, it is a figurative expression, rarely, if ever, strictly true. If it be predicated of the vendees own actual touch, or of the touch of any other person, it comes in each instance to a question, whether the party to whose touch it actually comes be an agent so far representing the principal, as to make a delivery to him a full, effectual, and final delivery to the principal, as contra-distinguished from a delivery to a person virtually acting as a carrier or mean of conveyance to or on the account of

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(d) 6 B. & Cres. 107.

(e) 6 B. & Cres. 422.

(g) Cited in *Ellis v. Hunt*, 3 T. R. 406.

(h) 2 Bos. & Pul. 457.

(i) 5 East, 184.

(f) Cited in *Bothlingk v. Inglis*, 3 East,

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the principal, in a mere course of transit towards him. In *Hunter v. Beale*, sittings after Trin. 1785, before Lord Mansfield, I cannot but consider the transit as having been once completely at an end in the direct course of the goods to the vendee, i. e. when they had arrived at the innkeeper's, and were afterwards under the immediate orders of the vendee, thence actually launched again in a course of conveyance from him, in their way to Boston, being in a new direction, prescribed and communicated by himself; and if the transit be once at an end, the delivery is complete, and the *transitus* for this purpose cannot commence *de novo* merely because the goods are again sent upon their travels towards a new and ulterior destination." Here the defendant was the agent of *Le Couteur*, and whenever goods arrived he took possession of them, and they remained in his hands subject to the orders of *Le Couteur*. In this very transaction *Le Couteur* ordered the defendant not to ship the goods; and they were at that time under the control of the defendant, who was his agent. *Dixon v. Baldwin* is confirmed by subsequent cases, *Hurry v. Mangles* (j), *Wright v. Lawes* (k), *Noble v. Adams* (l). In *Rowe v. Pickford* (m), where goods remained in the waggon-office of a carrier, subject to the order of the agent of the purchaser as to the place of their destination, it was held that the *transitus* was at an end, and that the vendor could not stop the goods. The facts in *Foster v. Frampton* (n), are not precisely like the present, but the judgments are in point. Mr. J. Holroyd said "the transit of the goods was at an end by the act of the consignee treating the goods as his own property, taking part to his own premises and directing the other part to remain in the warehouse of the carrier. From that moment the latter ceased to be a carrier, and became a mere bailee;" and Mr. J. Littledale observes, "It appears that the bankrupt, for his own convenience, was in the habit of leaving goods in the warehouse of the carrier, and that on this occasion he directed them to continue there after the period when they would otherwise have been delivered in the ordinary course of business. From the time when he drew the samples and gave those directions, the sugar must be considered to have been in the possession of the bankrupt, as much as if he had taken it to his own premises." In *Mills v. Ball* (o), Lord Alvanley said, "If in the course of the conveyance of the goods, from the vendor to the vendee, the latter be allowed to exercise any act of ownership over them, he thereby reduces the goods into possession, and puts an end to the vendor's right to stop them;" and to the same effect is Mr. J. Bayley's judgment in *Foster v. Frampton* (p). Another ground of objection is, that *Coates* had no authority from the plaintiff to stop the goods. There cannot be a stoppage in *transitu* by a mere stranger, and the subsequent recognition makes no difference, *Doe d. Mann v. Walters* (q). The defendant was not justified in giving up the goods at the request of a person who had no authority, and he rendered himself liable to an action by *Le Couteur*, or his assignees, for so doing.

TINDAL, C. J.—I have not felt any difficulty in the course of the argument, or I should have reserved this case for further consideration; but

(j) 1 Camp. 452.
 (k) 4 Esp. 82.
 (l) 7 Taunt. 59.
 (m) 8 Taunt. 84.

(n) 6 B. & Cres. 108.
 (o) 2 Bos. & P. 460.
 (p) 6 B. & Cres. 107.
 (q) 10 B. & Cres. 626.

it seems to depend upon the special circumstances which were proved at the trial, and not upon any matter of law. The first question is, was the *transitus* of the goods at an end? Now what was the destination of the goods? They were sent to *Le Couteur* at *Guernsey*, by way of *Southampton*, and the authority of the defendant is not left in doubt, for a letter was read at the trial which gave him a general authority to forward all goods which might arrive at *Southampton* directed to *Le Couteur*. There is nothing to shew that any new destination was to be given to the goods; but it is urged that this varies from ordinary cases, because the defendant paid the carrier, and for warehousing the goods, and also chose the ship by which they were to be forwarded. But this is done in almost every place in *England*, and I see nothing in this case to prevent the application of the general principle of law, and the *transitus* of the goods was not at an end until they arrived at *Guernsey*. Upon the evidence it appears, that *Le Couteur* and the consignors were all anxious that the goods should be stopped, and the defendant relies entirely upon a right of his own to retain the goods as a lien for his own debt, but he has no right of lien which he can set up. By whose authority were the goods landed? This point was left to the jury, and they properly found upon the evidence that the goods were taken back on account of the rightful owner. As to the last point which has been made, *viz.* that *Coates* had no authority from the plaintiff to stop the goods, it is to be remarked, that the defendant has no right which he can set up against the plaintiff in the present action; and there was afterwards abundant evidence of a ratification of that which he, *Coates*, had done, if a ratification had been necessary. It therefore appears to me, that the finding of the jury was correct, and that there is no ground in law for setting aside the verdict.

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The other judges concurred.

Rule discharged.

ELLIOTSON v. FREETHAM and an^r.

June 10th.

THE declaration stated, that before and at the time of committing the grievance complained of, the plaintiff was possessed of a dwelling-house, for the residue of a certain term, and that the defendants were possessed of certain workshops near to the plaintiff's dwelling-house, and that on the 20th day of *July*, 1831, and on other days, the defendants made in their said workshops divers large fires and divers loud noises, by means of which the plaintiff was disturbed in the enjoyment of his dwelling-house, &c., alleging special damage.

Plea.—That the defendants were possessed of their workshops ten years before the plaintiff became possessed of his said term in his said dwelling-house, and that the defendants always, from the time they so became possessed of their said workshops until the plaintiff became possessed of his dwelling-house, carried on their trade of ironmongers without any complaint from the occupiers of the plaintiff's said dwelling-house, and that the defendants manufactured their goods without making larger fires or louder noises than they had been accustomed to do, or than were necessary.

should have shewn a holding for twenty years.

In case for a nuisance to plaintiff's occupation of his dwelling-house the defendant pleaded that he had possessed his workshops for ten years before plaintiff became possessed of his term in the dwelling-house, and had there carried on his trade without complaint from the occupiers of the plaintiff's house:—*Held*, that the plea

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Replication. That although the defendants were possessed of their workshops before the plaintiff became possessed of his said term, nevertheless such term was created four years before the defendants were possessed of their said workshops, &c. *Demurrer and joinder.*

Hoggins.—It appears by the replication, that the plaintiff came to the nuisance of which he complains, he cannot therefore succeed in this action, *Leeds v. Shakerley (a).* He was stopped by the Court.

Per Curiam.—You cannot support your plea. If your argument is good, it must be extended to this, that if the plaintiff had purchased a valuable lease of long creation, but a few hours after the defendants had caused the nuisance, he would be prevented from disputing the existence of the nuisance, which was not in existence when he contracted for the purchase of the lease. The new Statute (b) points our attention directly to the rights between these parties. Under the Statute, if you had alleged that you had enjoyed this right for twenty years, you could have sustained the plea; but without that we cannot understand upon what you found your right.

Judgment for the plaintiff

(a) Cro. Eliz. 751.

(b) 2 & 3 Wm. 4, c. 71.

June 10th.

MARSON v. SHORT and BROOKE.

The following agreement held to be relating to the sale of "goods, wares, or merchandise," within the exception in the Stamp Act, 55 Geo. 3, c. 184, and therefore admissible without a stamp to shew a partnership between A. and B. "Memorandum of agreement between A. and B., which is, the horse to be 34l., B. to have half at 17l., and to pay half of the horse's expenses, being with C. At the same time agreed for the horse to go to Newcastle to be entered for the handicap and silver cup."

ASSUMPSIT against two defendants for horse-meat, &c., found and provided at their request; and for goods sold and delivered. *Plea:—Non assumpsit, and issue thereon.*

The cause was tried at a county court; and to shew that the defendants were jointly liable to pay for the horse-meat, the following unstamped agreement relating to the horse which the plaintiff had kept, was offered in evidence by the plaintiff.

"Memorandum of agreement between Wm. Short and Wm. Brooke, which is, the horse to be 34l., Wm. Brooke to have half at 17l., and to pay half the horse's expenses, being with Job Marson, from his arriving at Malton, Feb. 1, 1831. At the same time agreed for the horse to go to Newcastle, to be entered for the handicap and silver cup.

(Signed)

"Wm. Brooke,

"Wm. Short."

"March, 24, 1831.

It was objected for the defendant, that this instrument required an agreement stamp under 55 Geo. 3, c. 184, and the county clerk assented to the objection and rejected the evidence. Verdict for the defendants.

The plaintiff afterwards brought a writ of error, on a bill of exceptions tendered at the trial in consequence of the rejection of the evidence.

Cresswell, for the plaintiff in error.—*First*, This is an agreement for the sale of goods, and is therefore within the exception of the Stamp Act; it relates to the sale of the horse, and the latter part of the agreement only refers to the manner in which the horse shall be used by the parties. In

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Meering v. Duke (a), an agreement for the sale of a ship, which also contained special terms as to the manner in which the ship should be employed, was held not to require a stamp; and to the same effect is *Heron v. Granger (b)*. So in *Venning v. Leckie (c)*, where the defendant agreed to take half of certain goods, bought by the plaintiff on their joint account, and to furnish half the money, it was held that no stamp was necessary. In *Forsyth v. Jervis (d)*, a letter contained an agreement and also other matter, and Lord Ellenborough allowed that part to be read which did not require a stamp. So here, all which relates to the handicap might have been omitted, and the other part was admissible to prove that the defendants were joint owners of the horse. Secondly, The matter of the agreement is not of the value of 20*l.* or upwards, *Chadwick v. Sills (e)*. In *Doe v. Aris (f)* it was held, that an agreement signed by a tenant, to hold premises with scheduled fixtures at 2*s.* 6*d.* per annum, determinable at six months' notice, need not be stamped; the subject matter of the contract, viz. the right to occupy, not being shewn to be above the value of 20*l.*; and Lord Tenterden said, "the words of the act are so ambiguous, that the party objecting ought to make out the affirmative."—[*Tindal*, C. J.—He is bound to make out the affirmative, because it is not an exception but a substantive part of the enactment.]—Here it does not appear what was the value of the handicap and cup.

Stephen, Serjt., contrd.—In *Castleman v. Ray (g)* the Court refused to allow a part of an unstamped paper to be read for the purpose of establishing a collateral fact; and it is no difference whether the plaintiff or defendant produces it, *Doe d. St. John v. Hoare (h)*. Here the instrument is used directly as an agreement and not merely incidentally, which distinction was taken by Lord Ellenborough in *Wheldon v. Matthews (i)*. Secondly, The agreement was for the sale of goods to the value of more than 20*l.* It relates to the whole price of the horse, viz. 35*l.* Again a distinction may be taken between goods divisible and indivisible. The subject matter of this agreement was indivisible, as is said by Lord Coke (*j*); speaking of tenancy in common, he says, "But for the hawke or horse, albeit they be tenants in common, they shall joyne in an assise, for otherwise they should be without remedie, for one of them cannot make his plaint in assise of the moitie of a hawke, or of a horse, for the law will never suffer any man to demand any thing against the order of nature or reason, as before it appeareth by *Littleton*, section 129, *Lex enim spectat naturæ ordinem*. Also the law will never enforce a man to demand that which he cannot recover, and a man cannot recover the moytie of a hawke, horse, or of any other entire thing: *Lex neminem cogit ad vana, seu inutilia*. But in that case they shall join in an assise, and the reason is, *ne curia domini regis deficeret in justitiâ exhibendâ*, or *Lex non debet deficere conquerentibus in justitiâ exhibenda*." *Venning v. Leckie (c)* is distinguishable from the present case, for there the goods had been bought beforehand on the joint account of the parties. *Leigh v. Banner (k)*, *Buxton v. Bedall (l)*, and *Waddington*

(a) 2 Dow. & Ry. 121.

(b) 5 Esp. 268.

(c) 18 East, 7.

(d) 1 Stark. N. P. C. 437.

(e) 1 Rob. & Mood. 15.

(f) Cited 2 Chit. Stat. 964.

(g) 2 Bos. & P. 383.

(h) 2 Esp. N. P. C. 724.

(i) 2 Chit. Rep. 399.

(j) Co. Lit. sec. 139.

(k) 1 Esp. N. P. C. 403.

(l) 3 East, 303.

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v. *Bristow* (m), illustrate the argument already advanced for the defendant, and shew that the exception in the Stamp Act is construed strictly.

TINDAL, C. J.—It appears to me, that *Venning v. Leckie* (n) must govern our decision in the present case. The question is, whether this is a contract for the sale of goods, wares, and merchandize, within the meaning of the exception of the Stamp Act (o), which exempts from the stamp duties “any memorandum, letter, or agreement made for or relating to the sale of any goods, wares, or merchandize.” Here it appears that one of the parties had purchased a horse, the estimated value of which was 34*l.*, and the terms of the agreement are, that “*William Brooke* should have half at 17*l.*, and to pay half the horse’s expenses.” In other words, that on payment of 17*l.* *William Brooke* should be joint owner in a moiety of the horse. It is said, that this case is not governed by *Venning v. Leckie*, because that agreement related to an antecedent purchase of the goods on the joint account of the parties. In that case the agreement was, “Messrs. *W. Venning* and Co. I agree to take one-half share of the flax undermentioned, bought by you on our joint account, say half in the profits or loss, and to furnish you with half the amount in time for the payment thereof, in case you require it.” But it appears to me that the present case is much stronger, and ought clearly to be considered to be within the exception in the Statute, for it refers to a new agreement for the sale of the horse, whereas it might have been urged, in the other case, that the instrument related to the division, and not to the sale of the property.

Then it is objected, that the subject matter of this agreement being indivisible, it cannot therefore come under the term of goods, wares, or merchandize; but I see no reason for that distinction, for a party may sell a quantity of oil in a cistern, which is still in entirety, and yet is capable of being divided. I think, therefore, our judgment ought to be for the plaintiff in error.

PARK, J.—I think this case comes within the authority of *Venning v. Leckie* (n), and although other matters were inserted in the instrument as in *Forsyth v. Jervis* (p), I think it ought to have been received in evidence, although without a stamp. As to the cases cited to shew that fixtures and growing crops are not within the exception in the Statute, there is no doubt that they are not goods or chattels.

GASELEE, J.—I agree with the rest of the Court. It is said that there can be no sale of an interest in an indivisible chattel; but suppose this agreement had related to twenty horses instead of one, it would not be contended that the sale was not a sale of a chattel interest, and the same principle applies to the sale of a single horse.

VAUGHAN, J.—I am of the same opinion. I cannot distinguish this case from *Venning v. Leckie* (n).

Judgment for a *venire de novo*.

(m) 2 Bos. & P. 455.
(n) 13 East, 7.

(o) 55 Geo. 3, c. 184.
(p) Stark. N. P. C. 437.

FLIGHT v. GLOSSOP.

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June 10th.

COVENANT. The *declaration* stated, that *Abbott* and *Egerton* were possessed of the *Victoria* theatre and the two boxes thereof in the agreement thereafter mentioned, for a term of years then to come and unexpired. On the 26th *April*, 1834, by an agreement under seal made between *Abbott* and *Egerton* of the one part, and the plaintiff of the other part,

After reciting that it had been agreed between *Abbott* and *Egerton* and the plaintiff, that in consideration of 313*l.* paid by the plaintiff to *Abbott* and *Egerton*, they would pay to plaintiff 360*l.* on the 31st day of *December*, 1834, if certain persons, therein named, should be living on that day; and that the plaintiff should, till the said 31st of *December*, 1834, if all the said persons should so long live, have free use and enjoyment of two private boxes in the *Victoria* theatre aforesaid, one in the dress circle, and the other in the circle immediately above; and that if all the said persons should be living on the said 31st of *December*, 1834, the plaintiff should not pay any thing for the use of the said boxes; but if either of them should die before that day, the plaintiff should make such compensation for the use of the said boxes as should be just and reasonable; and reciting that the payment of the said 360*l.* had been secured by a certain warrant of attorney of *Abbott* and *Egerton*: it was agreed by *Abbott* and *Egerton* respectively, that thenceforth, until the 31st of *December*, 1834, if the said parties should so long live, *he the plaintiff, and such persons as he should appoint, should have the free use and enjoyment of two private boxes in the Victoria theatre aforesaid, one of them in the dress circle, and the other of them in the circle immediately over the dress circle*, on every night that the said theatre should be open for any performance or entertainment, except only on benefit nights; and that if all the said parties should be living on the said 31st of *December*, 1834, then the plaintiff should not pay any thing for such use and enjoyment of the said boxes; but if either of them should die before that day, then the plaintiff, or his executors, or administrators, should pay to *Abbott* and *Egerton*, or their executors, or administrators, such compensation for the use and enjoyment of the said boxes during the time he should have been entitled thereto, as should be just and reasonable.

That the said persons were still living; and that afterwards, and whilst the defendant had notice of the said agreement, the interest and term of years of *Abbott* and *Egerton*, in the said theatre, and all their estate, &c. in the said theatre, and the two boxes thereof, by assignment thereof, came to and vested in the defendant; and the defendant, by virtue thereof, then and there entered into and upon the said theatre and two boxes aforesaid, and became and was possessed thereof for the residue of the interest and term of *Abbott* and *Egerton* therein, and of their reversionary interest of and in the said theatre, and of and in the said boxes, granted as aforesaid; and that the defendant, well knowing the premises, on, &c. refused to permit or allow the plaintiff, and such persons as he appointed, the use and enjoyment of either of the said boxes, on any nights that the said theatre was open for performance and entertainment, the same not being a benefit night; and that the defendant ejected, expelled, thrust out, and evicted the plaintiff, and the

The lessees of a theatre by deed under seal, agreed to repay certain money lent to them by the plaintiff, on a day certain, and that until payment, the plaintiff, and such persons as he might appoint, should have the free use of two boxes in the theatre, one in the dress circle and one in the circle above, no specific boxes being mentioned. The lessees afterwards assigned their interest in the theatre to the defendant:—*Held*, that this was a mere personal contract, and that no action could be maintained against the assignee for refusing to permit the plaintiff to use the boxes in the theatre.

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persons whom the plaintiff on those nights respectively appointed; whereby &c. to the damage of the plaintiff of 1000/.

Plea.—That at the time of making the agreement there were, and thence hitherto had been more than one private box, to wit, five private boxes in the dress circle of the *Victoria* theatre; and there were more than one private box, to wit, five private boxes in the circle immediately over the dress circle of the *Victoria* theatre, in the agreement mentioned.

Replication.—That of the said private boxes in the dress circle, and of the said five private boxes in the circle immediately over the dress circle, the defendant, on, &c. refused the use or enjoyment to the plaintiff, and the persons whom the plaintiff appointed, of two private boxes in the said theatre, one of them in the said dress circle, and the other of them in the circle immediately over the dress circle, or either of them, contrary to the said covenant of *Abbott and Egerton*.

Demurrer and joinder.

Hoggins was called upon to support the declaration. It was held in *Taylor v. Walters* (a), that the right to the use of a box in the *Opera House*, was a licence which might be granted without deed, and there an action on the case for a disturbance of the right was held to be maintainable. Here an action of covenant is brought, although the effect of the agreement is to grant a lease of the two boxes to the plaintiff. It appears on the face of the instrument to be a mere licence, but it may, notwithstanding, be treated as a lease. In *Bac. Abr.* (b), it is said, "So if one only licence another to enjoy such a house, or land, till such a time, this amounts to a present and certain lease, or interest for that time, and may be pleaded as such, though it may be also pleaded as a licence. So, when the owner of a house entered into partnership, and assigned one-fifth, and covenanted that the partner should reside in the house, it was holden that he could not maintain an ejectment; besides that as a license to inhabit, it amounted to a lease." Here the defendant having notice, became assignee of the premises, subject to the demise of the boxes; and an implied consent is raised, which runs with the land, *Cole's case* (c), *Earl of Portmore v. Bunn* (d). In *Vyvyan v. Arthur* (e), an implied covenant to do suit at the mill of the demised premises, was held to run with the land. So in *Jourdain v. Wilson* (f), a covenant by the lessor to supply houses with water at a certain rate. Here the defendant could have sued the plaintiff for the rent of the boxes, if any rent had been reserved.

W. H. Watson.—The agreement is a mere contrivance to escape the effect of the usury laws. The cases cited from *Bac. Abr.* do not apply; for here no particular boxes are demised, but a mere licence is granted to occupy boxes which are not distinguished or pointed out. It may be a licence to occupy, but no estate is conferred, nor did any interest in land pass by the agreement. *Taylor v. Walters* (a) shews that this was a mere licence, if it amounted to any thing; but it may be questionable, whether it is so much as a licence. *Abbott and Egerton* do not covenant for themselves and their

(a) 7 Taunt. 374.

(b) Tit. "Lease," K. 817.

(c) 1 Salk. 185.

(d) 1 B. & Cres. 594.

(e) 1 B. & Cres. 410.

(f) 4 B. & Ald. 268.

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assigns, nor are there any words of grant or demise. In all the cases cited, there was a privity of estate between the parties, but here no interest in the land passed. *Spencer's case* (g), *Bally v. Wells* (h), *Webb v. Russell* (i), *Milnes v. Branch* (j), *Brewster v. Kitchen* (k).

TINDAL, C. J.—Without entering into the nice disquisition which has been raised, it is sufficient to say that this is a mere personal covenant; the sum and substance of it is that *Abbott and Egerton* shall repay a sum of money which had been lent to them; and the use of the boxes at the theatre is thrown in as a kind of bonus. Why are we to divide the covenant into two parts, and to say that one part relates to an interest in land, and the other to an interest in money? If it were necessary to go more particularly into the first branch, it would be sufficient to say that no interest in the land passed to the plaintiff. He had a right to the use of two boxes in the theatre at every performance, except on benefit nights; but he had no interest in any specific part of the theatre, but a mere licence to use two boxes, which are not particularly pointed out. Here the assignee cannot be charged with the payment of the money, nor can he be affected with that which is merely incidental to the payment. Lord *Coke* says (l), "Although the covenant be for him and his assigns, yet if the thing to be done, be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for himself and his assigns to build a house upon the land of the lessor, which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised, or that is assigned over; and therefore in such case the assignee of the thing demised cannot be charged with it, no more than any other stranger."

PARK, J.—This is a mere personal covenant, and appears to be made as a cloak for an usurious dealing. The parties desired to borrow a sum of money which was to be repaid within a year; and the use of the boxes at the theatre is thrown in by way of a bonus. Whatever remedy the plaintiff may have against the immediate parties, he has none against the defendant.

GASELEE, J., agreed.

VAUGHAN, J.—There is neither a privity of estate, or privity of contract, between these parties.

Judgment for the defendant.

(g) 5 Rep. 16.
 (h) Wilmot's Notes, 347.
 (i) 3 T. R. 402.

(j) 5 M. & S. 411.
 (k) 1 Lord Ray 317.
 (l) 5 Rep. 16, b.

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BEGGIE v. HAYNE.

The Stat. 13 Edw. 1, c. 37 (West. 2), which enacts that no distress shall be taken except by bailiffs "sworn and known," does not apply to distresses taken for rent in arrear.

REPLEVIN. The defendant made cognizance in the usual form, as bailiff of *Turguand and others*, for rent due to them.

Plea: that the defendant was not a bailiff sworn and known according to the provisions of Stat. 13 Edw. 1, c. 37 (a).

Demurrer and joinder.

Bompas, Serjt., in support of the demurrer.—*First*, If the Statute were held to apply to a distress for rent in arrear, the distress is not made void, but the bailiff may be grievously punished; therefore the plea is ill. *Secondly*, The Statute does not apply to distresses for rent in arrear.

Stephen, Serjt., contrd.—The Statute was made in affirmance of the common law (b), and the words are precise and distinct, that "no distress" shall be taken but by sworn bailiffs.

TINDAL, C. J.—It appears to me that the Statute of *Westminster 2d*, does not apply to private distresses; to understand the intention of the legislature in the 37th c. of the Statute, we should look at the 36th and 38th chapters of the same enactment. The 36th speaks of lords of courts and others that keep courts and stewards, intending to grieve their inferiors; and the 38th refers to sheriffs, hundredors, and bailiffs of liberties, who have used to grieve those who are in subjection to them. Now these chapters point out process in some court, and, I think, we must conclude, that the 37th is applicable to distresses of a similar description. Indeed, we have the opinion of Lord *Coke* upon the subject, in 2 Inst. fol. 445, when he refers to *Fleta*, who renders the branch of the Statute thus: "*Provisum est quod nulla districtio fiat per ballivos regis nisi jurati fuerint et noti, et si quis alimodo distringeret, et de hoc convincatur ad sectam districti*," &c. Indeed it would be strange that in one of those few cases, in which from the earliest times the subject has been allowed to obtain a remedy in right of himself, without the intervention of a court, and has been permitted to distrain cattle for rent in arrear and damage feasant, the party should be compelled to have recourse to the sheriff's bailiffs, and should not be allowed to levy the distress by his own bailiff, because he was not sworn and known. This doctrine is still further corroborated by the Earl of *Bedford's* case (c), where, in replevin, the defendant made cognizance as bailiff of the Earl, whereas in truth he was not his bailiff; and it was held that the plaintiff could not traverse that he was not his bailiff, for it is not issuable. Our judgment must be for the defendant.

The other judges concurred.

(a) Forasmuch also as bailiffs, to whose office it belongeth to take distresses, intending to grieve their inferiors, that they may exact money of them, do send strangers to take distresses, to the intent that they might grieve their inferiors by reason that the party so distrained, not knowing such persons, will not suffer the distresses to be taken, it is provided, that no distress shall

be taken but by bailiffs sworn and known, and if they which do distrain do otherwise, and thereof be convict, if the parties grieved will purchase a writ of trespass they shall restore damages to the parties grieved and be grievously punished, &c.

(b) 2 Inst. 445.

(c) Cro. Eliz. 14.

TANSLEY v. TURNER and ano^r.

Com. Pleas.

June 15th.

TRESPASS for carrying away certain timber trees, the property of the plaintiff. *Pleas*, first, not guilty; and secondly, that the trees were not the plaintiff's trees.

The cause was tried before *Park, J.*, at the last *Stafford Assizes*, and a verdict was taken for the plaintiff, subject to the opinion of the Court upon the following case:—

The plaintiff having purchased from one *Buckley* a quantity of growing timber then standing on his land at *Garmelow*, had it all felled, and after it was felled, entered into a contract for the sale of a portion of the trees to one *Jenkins*; sale notes, of which the following was a copy, were signed by the plaintiff and *Jenkins*:—"1833, December 26, Bargained and sold Mr. *George Jenkins*, all the ash at *Garmelow*, on lands belonging to *John Buckley, Esq.*, at the price per foot cube—say 1s. 7½d., payment on or before the 29th day of September, 1834. The above *George Jenkins* to have power to convert on the land. The timber is now felled: payment to be made in cash." Six or eight of the trees were measured on the 27th of December, and taken away by *Jenkins*. Some time after the remainder of the trees were marked and measured, and the length and girth of the several trees having been taken by the servants of the plaintiff and *Jenkins*, the cubic feet were taken, and the figures put down on paper by the plaintiff's servant. The cubic contents were not then ascertained, but the plaintiff said he would make the statement out and send it to *Jenkins*. This, however, he never did, *Jenkins* drew many trees away, and no one interfered to prevent him; he took them from all parts of the ground.

On the 15th of April, *Jenkins* became insolvent. On that day the plaintiff told *Jenkins'* servant not to remove any more of the timber till he knew who was to pay him; the servant mentioned that to *Jenkins*, who told him not to go on drawing the timber until he had settled with the plaintiff. *Jenkins* did not afterwards take any; but on the 9th of May a fiat of bankruptcy was issued against him, under which the defendant *Turner* was appointed assignee. In June the plaintiff caused the remainder of the timber, which was still lying as it had been felled, to be carried to his own saw-pits; and on the 15th of September the defendants took away about two loads from the pits to a timber-yard, after notice not to take it: and this was the trespass complained of.

The question for the opinion of the Court (who were authorized to draw such inferences from the above facts as a jury would have drawn) was, whether the assignee had a right to the possession of the timber? If that should be the opinion of the Court, then a nonsuit was to be entered; otherwise the verdict was to stand.

Lumley, for the plaintiff.—*First*, the property in the trees did not pass to *Jenkins*, because an act remained to be done on the part of the seller, for the admeasurement of the trees was not completed; that being so, the case is within the rule laid down in *Hanson v. Meyer (a)*; *Zagary v. Furnell (b)*;

Where the plaintiff sold timber felled on land occupied by A., to B. at per cube foot, and the length and girth of the timber was taken, but the total cubic contents of all the trees were not calculated, and B. fetched away part of the trees and marked the remainder:—*Held, First*, That the delivery was complete, and that nothing remained to be done on the part of the vendor. *Secondly*, That the timber being on the land of A., the vendor had no right of lien upon that which remained for the price of the whole.

(a) 6 East, 614.

(b) 2 Camp. N. P. C. 240.

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Wallace v. Breeds (c); *Simmons v. Swift* (d); and the latter case is quite in point. There a contract of sale was entered into in the following terms:—"I have this day sold the bark stacked at B. at 9*l*. 5*s*. per ton, of 21 hundred weight, to H. S., which he agrees to take, and pay for it on the 30th of November." Part of the bark was in a few days afterwards weighed and delivered to the vendee, who refused to take away the remainder: and it was held that the property in the residue did not vest in the vendee until the weight had been ascertained. In the present case the cubic contents were not ascertained, and the vendor's admeasurement was therefore incomplete. Secondly, the plaintiff had a lien upon the timber until the price was paid, *Miles v. Gordon* (e). And the delivery of part makes no difference, for it does not appear that the plaintiff intended to relinquish his right of lien upon the residue, *Bunney v. Poynts* (f); *Dixon v. Yates* (g). He exercised an authority over the timber by having it removed to his own saw-pit.—[*Tindal*, C. J.—That might have been a trespass].—Thirdly, *Jenkins* abandoned the contract, for when the plaintiff told his servant not to draw any more of the timber, there was an acquiescence on the part of the vendee.

Whateley, *contra*, was stopped by the Court.

TINDAL, C. J.—There was a complete delivery of the trees to the purchaser; they were on the land of *Buckley*, the purchaser having a right to enter to remove them. If any thing had remained to be done by the seller, no doubt the property would not have passed. But here, all which remained was to ascertain the total number of cubic feet; the number of each tree had been ascertained, and the mere adding up of the whole is too trifling a circumstance to authorize us in saying that the measurement was not complete. Then it is said that the vendor had a lien for the whole of the price upon the trees which were not taken away. He certainly had a right if the delivery was incomplete; but the trees were on *Buckley's* land; the purchaser was to enter when he pleased, to convert the timber, and that makes the land the warehouse of the purchaser. *Jenkins* took some of the trees, and marked the others, which shews that the vendor did not intend to retain any property in them. The case is therefore clear of the authorities which have been cited, and a nonsuit must be entered.

PARK, J.—The seller did every thing which was to be done, and the trees were all marked, to shew that they belonged to the purchaser.

GASKLER, J.—The only ground for the plaintiff's retaining the possession arises from his telling the purchaser's servant not to proceed with the removal of the trees, and *Jenkins's* acquiescence therein; but it was then too late, for the purchaser had become insolvent, and had no power to give up the contract. It was not indeed found that he had committed an act of bankruptcy at that time, but it is very probable that was the case.

VAUGHAN, J., concurred.

Judgment of nonsuit.

(c) 13 East, 522.

(d) 5 B. & C. 864.

(e) 2 Cr. & Mee. 511.

(f) 4 B. & Adol. 568.

(g) 5 B. & Adol. 313.

**ROSE and an', Assignees of H. J. SAVORY, an Insolvent,
v. M. SAVORY and an'**

Com. Pleas.
June 12th.

THE declaration stated that one *Henry Savory* by his will gave and bequeathed his estate and effects to his executors upon trust, to divide the same in certain shares between his two sons and the said *H. J. Savory* and the defendant *Moses Savory*, after the decease of *Elizabeth Savory*, the testator's wife; and he appointed his said wife and the said defendants executrix and executors and trustees of his said will; that the testator died, and the said executrix and executors duly proved his will; that after the said *H. J. Savory* signed his petition to the Insolvent Debtors' Court, and was discharged from imprisonment, and after the said plaintiffs became assignees as aforesaid, the said *Elizabeth Savory* departed this life, and that the said defendants, as such surviving executors, on the 1st day of *December*, 1834, rendered an account to the said plaintiffs as such assignees, and then assented and agreed that the said plaintiffs were entitled to the sum of 622*l.* 6*s.* 10½*d.* according to the said bequest, which said sum the said defendants promised to pay: there was also a count on an account stated.

Pleas:—First, non-assumpsit.

Second, that before the said *H. J. Savory* became an insolvent debtor, to wit, on the 2d *January*, 1832, the said *H. J. Savory*, being in want of money, applied to the defendant, *Moses Savory*, to lend him 400*l.*, to be secured by a certain deed; whereupon the said *H. J. Savory*, in consideration of the said sum having been so lent to him, &c., did assign and transfer the share of him the said *H. J. Savory* in the effects of the said *Henry Savory*, in reversion, expectant on the decease of the said *Elizabeth Savory*; to hold the same upon trust, that the defendant, *Moses Savory*, should, after the decease of the said *Elizabeth Savory*, out of the money which should come to the hands of the said *Moses Savory*, as one of the executors of the said will of the said *Henry Savory*, deceased, deduct and retain the said sum of 400*l.* and interest, and transfer the residue thereof unto the said *H. J. Savory* absolutely; that at the time of the death of the said *Elizabeth Savory* the said 400*l.* and 55*l.* for interest was due and unpaid to the defendant *Moses Savory*, whereby the defendant became entitled to retain a great part, to wit, 455*l.* of the said share in the said declaration mentioned, and which said share it is in the said declaration alleged that the defendants assented and agreed that the plaintiffs as such assignees were entitled to, and whereby and by means whereof there was not at any time any consideration for the defendants making the said supposed promise to the plaintiffs.

Replication: That at the time of the making the said agreement and indenture, the said *H. J. Savory* was in insolvent circumstances, and did voluntarily make the said indenture, and that he entered into and made the said indenture with the view and intention of petitioning the Insolvent Debtors' Court for his discharge (*a*).

The defendants traversed the replication, whereupon issue was joined At the trial before Lord *Denman*, C. J., at the Spring Assizes for *Surrey*, the

The executors of a will under which A., an insolvent debtor, was entitled to a legacy, gave his assignees a balanced account, wherein they admitted 622*l.* to be the amount of the legacy; but, on the other side, they debited the insolvent with a loan of 400*l.*, advanced on the security of the legacy when it was in reversion; the assignees proved at the trial that the instrument by which the loan was secured was void under the Insolvent Act:—*Held*, that they were entitled to recover the whole of the legacy.

(a) *Vide* 7 Geo. 4, c. 57, s. 32.

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following account in the hand-writing of the defendant, *M. Savory*, was proved to have been given to the plaintiffs.

Dr. The executors of the late *H. Savory*, in account with the estate of the deceased, Cr.

	£	s.	d.
Balance of assets	2488	15	5
<i>H. J. Savory</i> one-fourth share of balance	622	3	10½
Amount of assignment 400 <i>l.</i> }	455	0	0
2½ years' interest on do. 55 <i>l.</i> }			
Balance due to assignees	£ 167	3	10½

It appeared that the above-mentioned 400*l.* was advanced to the insolvent on the 28th of *November*, 1831, and that the deed was executed on the 2d of *January*, 1832, at which time it was proved that *H. J. Savory* was in embarrassed circumstances; the jury found that the 400*l.* was advanced to the insolvent to support his credit, and that he made the assignment with a view to petition the Insolvent Debtors' Court for his discharge; they also found a joint promise by the defendants to pay the money.

Verdict for the plaintiffs for 622*l.* 3*s.* 10½*d.*, with leave reserved for the defendants to move to reduce the damages to the amount of the balance of 167*l.* 3*s.* 10½*d.*

Channell applied for a rule *nisi* to enter a nonsuit or to reduce the damages to 167*l.* 3*s.* 10½*d.*, or for a new trial. The action being brought against executors to recover a legacy, the plaintiffs would have had no *locus standi* in Court, if they had not relied upon the account which was received in evidence. *Deeks v. Strutt* (b) establishes the general rule that no action at law lies for a legacy. To the same effect is *Jones v. Tanner* (c). At the trial *Gregory v. Harman* (d) was relied on for the plaintiffs, but there the defendants were not considered as having retained the money in their hands as executors; so here, if the action lies at all, it must be considered that the defendants have divested themselves of their characters of executors, or the action could not be maintained, and the account must be taken as it stands, and that amounts only to an admission that the balance was due.

The rule was granted to reduce the damages, but refused as to the new trial

Platt and *Comyn* shewed cause.—The jury have found that the advance was made by the executor to keep up the credit of his brother, who was at that time in embarrassed circumstances, and that the assignment was void under the provisions of the Insolvent Act: the account cannot be considered conclusive, it amounts merely to *primâ facie* evidence, subject to any explanation which could be given. In *Randle v. Blackburn* (e), no such explanation was offered.

Channell, contrâ.—The account upon which alone the plaintiffs rely is the

(b) 5 T. R. 690.

(c) 7 Barn. & Cres. 542.

(d) 1 Moore & P. 209.

(e) 5 Taunt. 245.

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very gist and foundation of the action. The evidence shews that the money was advanced in *November*, 1831, and the deed was not executed until *January*, 1832; the deed may therefore be void, in consequence of the finding of the jury; but the debt still remains, and is set up by the account which was produced. Here the verdict has only tainted the security given to *M. Savory*, but the debt is still morally and legally due to the executors. The whole of the account which a party gives of a transaction must be taken together; and his admission of a fact disadvantageous to himself, ought not to be received without at the same time receiving his contemporaneous assertion of a fact favourable to himself, *Randle v. Blackburn* (f).

TINDAL, C. J.—This rule should be discharged. The action is brought to recover the full amount of a legacy in the hands of the defendants. This is in form an action upon an account stated, and it is true that the plaintiffs would have had no *locus standi* in court, unless such an account had been produced in evidence; by this account the defendants admit, on one side, a receipt of 622*l.* 3*s.* 10*d.*, and on the other side they claim 455*l.* for principal and interest on an assignment, leaving a certain balance, which is admitted to be due. The only question is, whether this account, having been rendered, the plaintiffs are so conclusively bound by the item on the debtor side, as to be prevented from disputing it. I know of no rule of law to preclude them from shewing that a particular item is incorrect; thus they may shew a mistake in the payment of the money, and if this is so when the account consists of many items, why should it not be so when there is only one? It is said that this was a settling of the account between the parties, but the evidence was, that the assignment was an instrument which the law would not support; it was given to one of the defendants as a security for a loan advanced to keep up the credit of the insolvent, which was then in a declining state, and the jury have found that the assignment was made with a view of petitioning the Insolvent Debtors' Court; and by a clause in the Insolvent Debtors' Act, an assignment made under such circumstances is altogether fraudulent and void. But the case does not even rest here; there is a precise issue raised by the pleadings upon the validity of this assignment, which has been found by the jury in favour of the plaintiffs; it therefore seems to me that the plaintiffs are entitled to recover the whole of the property held by the defendants for the insolvent, and the defendants cannot avail themselves of this mode of setting off the debt. There is no reason to impute fraud to the defendants personally, but the insolvent has done that which the law declares is a fraud upon his other creditors. The rule must be discharged.

PARK, J.—I agree that although an account may be clear upon the face of it, it is not so conclusive that the other party may not shew that a particular item is incorrect; here the jury have found that the money was advanced to keep up the credit of the insolvent, and that when the assignment was made the party intended to take the benefit of the Insolvent Act; the verdict therefore stands firm, and cannot be altered.

GASLEE, J.—I felt a difficulty for some time as to whether the plaintiffs

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were not bound to take the account as it stands, but upon further consideration I think the verdict should not be reduced.

VAUGHAN, J.—The account is not conclusive, and the assignment which appears upon the face of it, has been declared to be fraudulent by the verdict of the jury.

Rule discharged.

COX v. PEACOCK, Executor, &c.

In assumpsit against an executor he pleaded a retainer and *plene administravit præter*, and the plaintiff, admitting the truth of the pleas, took judgment of assets *quando acciderint*.—*Held*, that he was entitled to enter it up for the debt and costs.

ACTION against an executor, on a promissory note made by the testator. *Pleas*: 1st, A retainer; and 2d, *Plene administravit præter*, 10l. The plaintiff admitted the truth of the plea of retainer, and having had the principal and interest computed and the costs taxed, he took judgment of assets *quando acciderint*, for the remainder of the debt; but the prothonotary refused to allow the plaintiff to enter up the judgment for his costs.

Wilson applied for a rule to require the prothonotary to review his taxation. *De Tastet v. Andrade* (a) is precisely analogous to the present case, and there it was held that the plaintiff was entitled to have judgment entered for his costs *in futuro*.—[*Park, J.*—*Batt v. Deschamps* (b) is an authority against you.]—But there the nature of the plea is not stated.

The Court said they would confer with the other judges, in order that an uniform rule might be established, and on a subsequent day they intimated to the prothonotary that the plaintiff was entitled to his costs, as well as to his damages, *de bonis testatoris quando acciderint*, and they directed the judgment to be entered accordingly.

(a) 1 Chit. Rep. 629, 630, note.

(b) Cited Tidd. 980, 9th ed.

LOUISA CURSHAM, SUSANNAH WOODYER MERRICKS, and
HARRIET MERRICKS, Plaintiffs;
and

WILLIAM CHARLES NEWLAND, WILLIAM WOLLAMS HOLLAND,
RICHARD MERRICKS, GEORGE BUCKTON and ELIZABETH his
Wife, ELIZABETH MERRICKS BUCKTON, GEORGE BOWDLER
BUCKTON, MARIA LOUISA BUCKTON, FANNY BUCKTON,
EMMA BUCKTON, AMELIA BUCKTON, BENJAMIN WOODYER
GILBERT, GEORGE FAGG GILBERT, and THOMAS GILBERT,
and WOODYER MERRICKS BUCKTON, Defendants.

Devise to A., B., and C., and their lawful issue respectively,

in tail general, with benefit of survivorship among the issue respectively as tenants in common.—*Held*, that A., B., and C. took life estates, and their children contingent remainders in tail general, by purchase in their respective parents' shares, with cross remainders in tail among A., B., and C.: the testator having used the word "issue" as synonymous with "sons" or "daughters."

ON the hearing of this cause by his Honor the Master of the Rolls, on the 8th day of July, A. D. 1833, it was ordered that the following case should

be stated for the opinion of this Court, and accordingly it came on for argument in *Easter Term*, 1835 :—

Richard Merricks, by his will duly executed and attested, after giving a legacy of 50*l.* to each of his executors and trustees, as an acknowledgment for the trouble they might have in performing and discharging the trusts of the will, and after reciting that he was seised in fee of one undivided third part of certain messuages at *Hillingby*, gave and devised the same “Unto and to the use of my nephews, *B. W. Gilbert* and *G. F. Gilbert*, and their assigns respectively, during their natural lives, and the life of the longest liver of them; and after the determination of those estates, by forfeiture or otherwise, to the use of my trustees *Wm. Chas. Newland*, *Wm. Woollams Holland*, and *Henry Hall*, and the survivor of them, and the heirs of such survivor, during the lives of my said nephews, and of the survivor of them; upon trust to preserve the uses hereinafter limited from being defeated, and to make entries and bring actions; but nevertheless to permit and suffer my said nephews, or the survivor of them, or their assigns, to take the rents, issues, and profits of the same premises during their natural lives, and the life of the longest liver of them, to and for their and his absolute use; and from and after the decease of my nephews and the survivor of them, to the use of all and every the lawful children of my nephews, and to their heirs and assigns for ever, as tenants in common and not as joint tenants; and in case there shall be only one such child, then to such only child, and his or her heirs and assigns for ever; but in the event of there being no such child, or there being children of my said nephews, or such only child, and they, or he, or she, dying in the lifetime of the said *B. W. Gilbert* and *G. F. Gilbert*, or the survivor of them, without leaving lawful issue, then, from and after the decease of the said *B. W. Gilbert* and *G. F. Gilbert*, and the survivor of them, I give and devise all the aforesaid messuages to and for the same uses, ends, intents, and purposes, as I have hereinafter directed as to the disposal of my residuary real and personal estates :” and after directing his said trustees, within three months after his decease, to invest 4000*l.* in some of the government stocks, directed that they should stand possessed of the same, upon trust, “to pay to his son *Richard Merricks*, or to permit and suffer him to receive the dividends arising therefrom during his natural life; and in case he should intermarry with any wife, and leave her him surviving, then to pay to such wife, or to permit her to receive the same dividends during her natural life, and after the decease of the survivor, then upon trust, to pay the principal of the said trust-moneys, stocks, or funds, in equal shares and proportions unto and amongst all and every the children of my said son, *Richard Merricks*, lawfully begotten, who shall live to attain the age of twenty-one years, being a son or sons, or, being a daughter, shall live to attain that age, or be married with the consent of her parents or guardians; and if there shall be only one child of my said son who, being a son, shall live to attain the said age, or, being a daughter, shall attain that age, or be married with such consent as aforesaid, then upon trust, to pay, assign, and transfer the whole of the said trust, stocks, or funds, to such only child for his or her own use and benefit absolutely; but in case my said son, *Richard Merricks*, shall happen to die without leaving lawful issue, or, leaving lawful issue, such issue being a son, shall not live to attain the age of twenty-one years, or, being a daughter, shall not attain that age, or be mar-

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nied as aforesaid, then upon trust, immediately after the decease of my said son, *Richard Merricks*, and of any wife with whom he may have intermarried, and of the survivor of them, to pay, assign, and transfer the said principal, trust, stocks, and funds, in equal shares and proportions between and amongst my four daughters, *Elizabeth*, the wife of *George Buckton* the younger, *Louisa Merricks*, *Susannah Woodyer Merricks*, and *Harriet Merricks*, who shall be then living, or to the lawful issue of such of them as shall be then dead, such issue taking the part or share which their, his, or her mother would have been entitled to, had she been then living, such share to be divided in equal parts and proportions amongst the children of such of my daughters who shall be then dead, if more than one, and if but one, then the whole of such my deceased daughter's share shall go and be paid to such only child; and if neither of my said daughters shall be then living, at the decease of my said son, *Richard Merricks* and his wife, without leaving lawful issue as aforesaid, then I direct that the whole of the said trust, stocks, and funds shall be divided between and amongst all my grandchildren (being children of my aforesaid daughters), equally between them."

"*Item* :—I give, devise, and bequeath all the rest of my freehold, copyhold, and leasehold estates, with all my household goods, plate, linen, china, and all other my real and personal estate, with their appurtenances, according to the nature and quality of such estates respectively, to *my dear wife *Elizabeth Merricks*, to have, receive, and take the rents, issues, and profits, interest, dividends, and proceeds thereof, for her own absolute use and benefit for and during the term of her natural life, and from and immediately after her decease unto my said son and daughters, *Richard Merricks*, *Elizabeth*, the wife of the said *George Buckton**, *Louisa Merricks*, *Susannah Woodyer Merricks*, and *Harriet Merricks*, and their lawful issue respectively in tail general, with benefit of survivorship to and amongst their issue respectively, as tenants in common and not as joint tenants; provided always, that such issue not to have a vested interest until they attain the age of twenty-one years, being sons, and, being daughters, until they shall attain that age or be married: but during the minority of the said issue of my said son and daughters respectively, I do hereby authorize my said trustees, or the survivors or survivor of them, or the heirs of such survivor, after the death of either my said son or daughters respectively, to apply the whole or any part of the rents, issues, and profits of the said estates, and not exceeding the interest of the presumptive share of each child therein, for and towards his, her, or their maintenance, education, and advancement in life during minority: and in case my said son and daughters, or any or either of them, shall die in my lifetime or after my decease without leaving lawful issue, or with lawful issue, and such issue being a son or sons, shall not live to attain the age of twenty-one years, or being a daughter or daughters, shall not live to attain that age or be married; then the part or share, or parts or shares of him, her, or them so dying, to be for the benefit of the survivors and their issue; in the same manner as their original parts and shares are hereinbefore given to them respectively as aforesaid.

"*Item* :—I do hereby make, constitute, nominate and appoint the said *William Charles Newland*, *William Woollams Holland*, and *Henry Hall*, executors of this my will; provided, and my will is, that my said trustees and executors hereinbefore named, and the survivors and survivor of them,

and the executors and administrators of such survivor, shall and may at all times, in the first place, reimburse and indemnify themselves and himself respectively, all such costs, charges, damages, and expenses as they or either of them shall or may at any time expend, lay out, and be put unto for or by reason or means of all, any, or either of the trusts hereby in them reposed," &c.

The said testator departed this life on the 26th of *June*, 1822.

The said *B. W. Gilbert* has one child only (that is to say) the defendant, *Thomas Gilbert*.

The said *George Fagg Gilbert* never has had any child.

The said *Richard Merricks*, the son of the testator, has never had any child.

The said *Louisa Cursham*, one of the said plaintiffs, never had any child.

The said *Elizabeth Buckton*, one of the said defendants, has seven children, that is to say, the said *Elisabeth Merricks Buckton*, *George B. Buckton*, *Maria Louisa Buckton*, *Fanny Buckton*, *Emma Buckton*, *Amelia Buckton*, and *Woodyer Merricks Buckton*, all of whom are infants under the age of twenty-one years.

The said *Elisabeth Merricks*, the devisee for life, departed this life in the month of *April*, 1825.

The question for the consideration of the Court on the preceding case was—

What estates the children took in the freehold, copyhold, and leasehold lands, respectively; and whether the grandchildren take by purchase any, and what estates, in the same lands respectively, or any of them?

Preston, for the plaintiffs.—In the first clause of the will there is the devise to the nephews for life, with remainder to the children, which is a clear and distinct devise to distinguish it from the residuary bequest. Now, in the residuary bequest, there is this particularity favourable to the construction, that the children take estates tail, namely, that they are to take in tail general. The substantial part of this residuary clause is a devise to the wife for life, and from and immediately after her decease, to the son and daughters, and their lawful issue respectively; and supposing it had stopped there, it would have been clearly an estate tail in the children, *King v. Melling* (a). But from the introduction of the words, tail general, the question arises whether the Court can cut down the gift, and read the limitation to the issue, as to the children. In order to answer the testator's general intention, and having regard to the former devise, the children take estates tail in the residuary freehold and copyhold estates, subject to the limitation over by way of contingent remainders; and they take corresponding interests in the residuary leaseholds, subject to a limitation over by way of executory bequest, and there are also interests in the nature of cross remainders between the sons and daughters.

That there is to be a tenancy in common is expressly stated; but whether amongst the children themselves, or their issue, may be a question. The gift to the son and daughters would create a joint tenancy, if the subsequent words do not apply to them: that being the case, supposing the son and daughters take estates tail, there will be a regular succession; each branch of the family would have one-fifth, and on failure of either branch, the other branches would increase proportionably in their shares. But if the words creating the tenancy in common apply to the issue, then they take as pur-

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chasers. The word "issue," when the context requires it, may be construed as a word of purchase; but then it must appear that they take in their own right, and in conformity with the testator's intention; but such a construction in this case would produce extreme confusion. Issue will include children and grandchildren, unless it appears that it is confined to the first degree. Then as to the mode of taking under issue, and their issue: suppose there be ten from one stock, and five from another, in what mode and proportions is the division to take place, *per capita* or *per stirpes*? In the case of *Mogg v. Mogg* (b), it was held by a court of law upon the following devise, "to the children begotten and to be begotten of testator's daughter, *Sarah Mogg*, during their lives, and after the decease of such children to the issue of such children and their heirs, as tenants in common without survivorship, and in default of such issue then over," that the children of *Sarah Mogg* took estates in tail general as tenants in common with cross remainders. So in *Murthwaite v. Jenkinson* (c), where the devise was to testator's three nieces, *A. B.* and *C.*, equally to be divided among them, for life, and after the decease of them or either of them, that the lawful issue of them and each of them should have and enjoy his or her mother's share for life, and if either of the nieces should die in the lifetime of the others or other of them, without issue of her body lawfully begotten, the share of the niece so dying should go to the survivors for life, and afterwards to the lawful issue of the survivors; and if all the nieces and their issue, save one, should die without issue lawfully begotten, then to the surviving niece for life, and after her decease to her lawful issue, if more than one, equally between them, and if but one, then to such one, his heirs and assigns for ever; and if all the nieces should die without issue, then over: the Court held that the nieces took estates tail in the freehold, and absolute interests in the leasehold. So in *Franklyn v. Lay* (d), where the devise was unto testator's grandson, *J. F.*, and to the issue of his body lawfully to be begotten, and to the heirs of such issue; but if *J. F.* should die without leaving any issue of his body lawfully begotten, then over: it was held to be an estate tail. *Doe d. Cock v. Cooper* (e); *Frank v. Stovin* (f); *Roe d. Dodson v. Grew* (g); *King v. Burchell* (h), are cases in which the Courts have decided with reference to the general intention of the testator, in opposition to a particular intent, and given estates tail. If this Court, following the authorities, read the words lawful issue respectively, as applicable to the five children, and give cross remainders among them, the construction is simple, and the testator's intention is better answered. Suppose again, the issue take as purchasers, and one of the stock dies, leaving nine issue surviving, a tenth having died, leaving a great number of issue, are you to give nine parts to the living children of the stock, and a tenth to the issue of the deceased tenth? The difficulties indeed would be inextricable if issue be taken as a word of purchase, but if taken as a word of limitation, there is no difficulty; and for this latter view of the case we have the additional warrant from the words "in tail general" used by the testator.

Teed, for defendants.—This case differs from all the cases cited. It has been said it has this particularity, namely, that by reason of the words "in

(b) 1 Merivale, 654.

(c) 2 B. & C. 357.

(d) 2 Bligh, 29.

(e) 1 East, 229.

(f) 3 East, 548.

(g) 2 Wilson, 322.

(h) Ambler, 379.

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tail general," made use of by the testator, the children must take estates tail. The question really is, whether those particular words refer to the children or to the grandchildren. It is submitted that they refer to the grandchildren. In the case of *Mogg v. Mogg* (i), cited on the other side, there was no direction as in the principal case, that the issue should not have a vested interest until they attained the age of 21 years; nor was there a maintenance and education clause as a provision during their minority, nor any devise over upon the death of the first takers in the lifetime of testator. In *Murthwaite v. Jenkinson* (j), the Court was of opinion, upon the fourth point, that the nieces took estates tail, because that interpretation was in accordance with the general intention of the testator. In *Frank v. Stovin* (k), there was a general remainder over to the tenant for life after failure of issue. It is plain that the testator has used the words issue and child as synonymous and commutable terms. The clause containing the bequest of 4000*l.* bears out this position; where the testator says that the issue shall take the mother's share; and he must there mean child, and not a more remote descendant, *Sibley v. Perry* (l); *Hampson v. Brandwood* (m). It is said there would be great confusion if the word issue is to include children and grandchildren of the testator's children; but it is restrained to the children, which prevents any confusion. If the word child was substituted for that of issue, there would be no difficulty in the case; then the grandchildren of testator would take estates tail as purchasers, which was clearly the testator's intention. Under the residuary clause, therefore, the testator's son and daughters take as tenants in common for their respective lives, in the freehold and copyhold estates, with contingent remainders of their respective shares to their respective children by purchase as tenants in common in tail, with cross remainders between the children in tail, with cross limitations between the families, and the residuary leaseholds are subject to corresponding limitations.

Preston, in reply.—The Court is bound to see the general intent effectuated, to keep the property in the line of the descendants. Accordingly they have, in express violation of the language of wills, given estates tail where other estates were expressed, in order to effectuate the testator's intention, *Robinson v. Robinson* (n). From the first devise it is apparent that the testator was well advised of the mode of giving estates for life, and how to give them as purchasers; the context therefore speaks in plaintiff's favour. The testator's general intention was in favour of giving in tail. Beyond all doubt testator intended grandchildren to take, but he uses the word "issue" not as "children," but in the largest sense of which it was capable. The other side have not grappled with the difficulty; the testator might have had children, who might die leaving issue, whom he intended to take under the will; the grandchildren would thus be able to take, though the children would not. The bearing of the Courts is, moreover, in favour of estates tail: the words *son* and *child* may be used, and still it might be more convenient that there should be estates tail. Suppose a child dies, leaving no child, but leaving a grandchild, the grandchild would be excluded if effect should be given to particular words, but the Court, in its eagerness to fulfil the

(i) 1 Merivale, 654.

(j) 2 B. & Crea. 358.

(k) 3 East, 548.

(l) 7 Ves. jun. 592.

(m) 1 Madd. 381.

(n) 1 Burr. 38.

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intention of a testator, would hold in favour of estates tail, *Doe d. Jones v. Davies (o)*.

The following certificate was sent in by the Court in the present *Trinity Term*.—

We have heard this case argued by counsel, and considered it; and we are of opinion that the children of the testator took estates for their respective lives as tenants in common in the freehold and copyhold lands devised by the residuary clause of the will, and the grandchildren contingent remainders in tail general by purchase in the shares of their respective parents in the same lands, with cross-remainders in tail among such grandchildren respectively, and cross-remainders in tail among their parents; the testator having, in our opinion, used the words "issue of child or children" as synonymous with "sons or daughters of a child or children:" and that the children and grandchildren respectively took corresponding interests in the leaseholds.

*N. C. Tindal.**J. A. Park.**S. Gaselee.**J. B. Bosanquet.*

(o) 4 B. & Ado. 43.

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Devise of freehold, copyhold, and leasehold estates, and all other the testator's real and personal estates unto *N., H., & H.*, their heirs, executors, administrators, and assigns, and to the heirs, executors, administrators, and assigns of the survivor, upon trust to pay, and apply, or permit and suffer *M.* to take the rents and profits for her absolute use for life, and after her decease, upon trust for *A., B., and C.*, and their lawful issue respectively, in tail general, with benefit of survivorship to and amongst their issue respectively as tenants in common, such issue not to have a vested interest till twenty-one, and the said trustees, after the death of *A., B., & C.*, or either of them, to apply the whole or any part of the rents and profits of the trust estates, not exceeding the presumptive share of each child, towards his or her maintenance during minority:—*Held*, that the trustees took an estate in fee in the freehold and copyholds, and an absolute interest in the leaseholds.

THERE was also a second case sent to the Court between the same parties, upon a similar state of facts as those above given, except that immediately preceding the first devise to the testator's nephews, the following clause was inserted:—"Unto *W. C. Newland*, the Rev. *W. W. Holland*, and the Rev. *H. Hall* (my executors hereinafter named), and the survivors and survivor of them, and the heirs of such survivor, upon trust," to the use of my nephews, &c. [as in the foregoing case]; and the life interest to testator's wife in the residuary bequest, was thus stated, Unto the aforesaid *W. C. Newland*, *W. W. Holland*, and *H. Hall*, their heirs, executors, administrators, and assigns, and to the heirs, executors, administrators, and assigns of the survivors or survivor of them, according to the nature and quality of such estates respectively, upon trust, that they my said trustees, or the survivors or survivor of them, his heirs, executors, or administrators, do and shall pay and apply, or permit and suffer "my dear wife, *Elizabeth Merricks*, to have, receive, and take the rents, issues, and profits, interests, dividends, and proceeds thereof, for her own absolute use and benefit for and during the term of her natural life; and from and after her decease, upon trust, for my said son and daughters, *Richard Merricks*, *Elizabeth*, the wife of the said *George Buckton*, &c. (a)."

The question upon this second case was—

Whether the trustees took any, and what estate in the freehold, copyhold and leasehold lands respectively, or any of them?

(a) These words in inverted commas were inserted between the asterisks at page 274.

The following points were stated between the parties.

The plaintiffs will submit that the nature of the trusts requires that the trustees should have and retain the legal fee of the residuary freehold and copyhold estates, and all the legal estate of the testator in the residuary leasehold estates.

The defendant will contend that the trustees take the legal estate for the life of the testator's wife, and no longer, or if she take any further legal interest, that such interest is at most a chattel interest commensurate with the minorities of the grandchildren (*a*).

Preston, for the plaintiffs.—It is important that this devise is of the freehold, copyhold, and leasehold estates, which are united together by the subsequent words, whereby they are given, “to the heirs, executors, administrators, and assigns of the survivor, according to the nature and quality of such estates respectively.” The Court will appropriate the word heirs to apply to the inheritance of the freehold estates, which proves that it was the intention of the testator that the fee should vest in the trustees. It is necessary that the devise should be so considered, in order to preserve the contingent remainders in favour of the issue; and the clause of maintenance shews that as the trustees have a power, they should also have an estate. Very slight circumstances will induce the Court to give the fee to the trustees, as in *Doe d. Keen v. Walbank* (*b*), *Murthwaite v. Jenkinson* (*c*).

The following certificate was sent in by the Court in the present *Trinity Term*.—

We have heard this case argued, and considered it; and are of opinion that the trustees took an estate in fee in the freehold and copyhold lands devised by the residuary clause, and an absolute interest in the leaseholds.

N. C. Tindal.

J. A. Park.

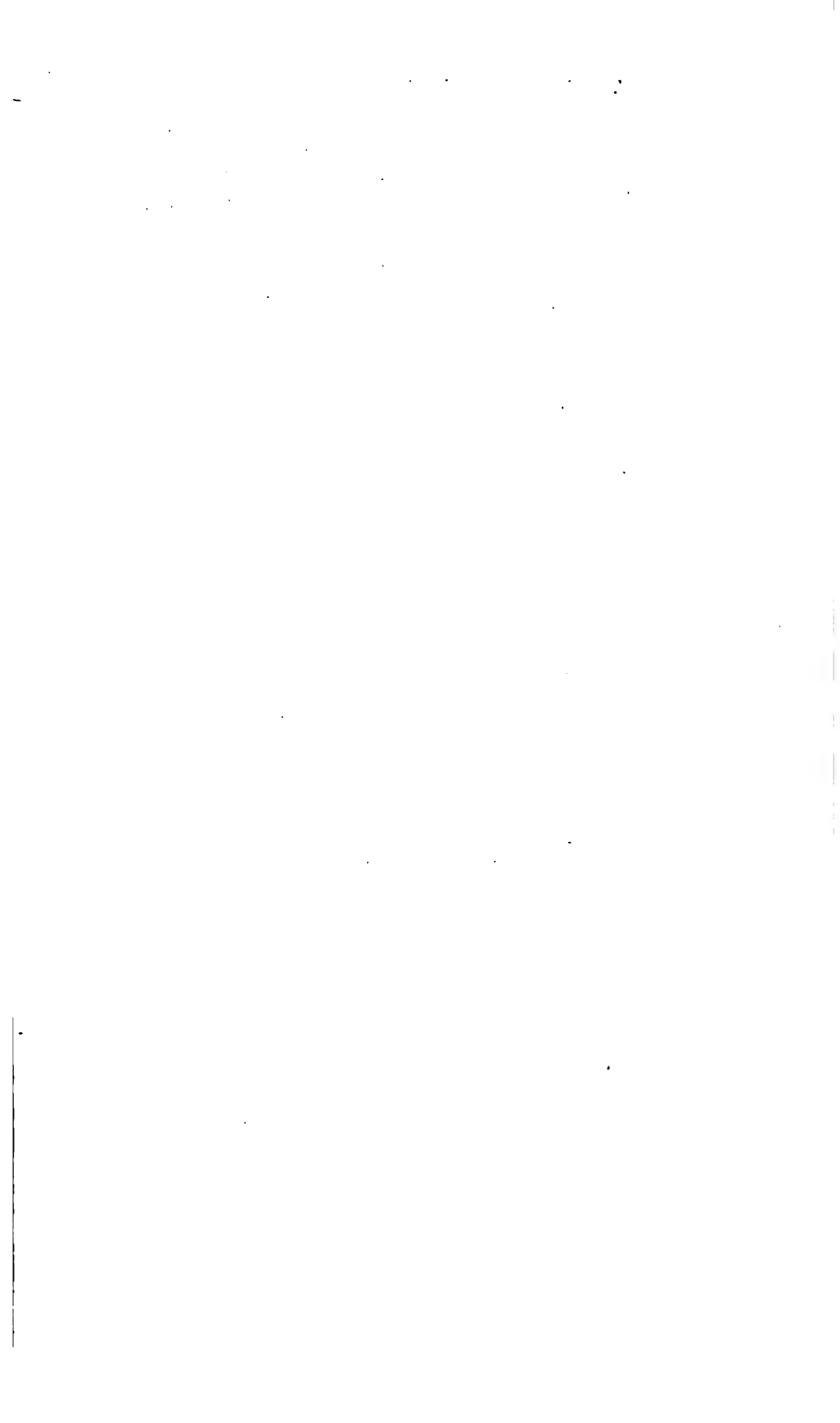
S. Gaselee.

J. B. Bosanquet.

(*a*) *Teed* admitted that his clients were little interested in this case, and he therefore declined to press any arguments in reply.

(*b*) 2 B. & Ad. 554

(*c*) 2 B. & Cres. 357; and see *White v. Parker*, *ante*, 112.



CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas Term, 1835.

WILKS v. HUNGERFORD MARKET COMPANY.

Com. Pleas.

Nov. 4th.

CASE. The declaration stated that before and at the time of the committing of the grievances after mentioned, there was, and still of right ought to be, a certain public footway, passage, or thoroughfare, leading from and out of the *Adelphi*, in the county of *Middlesex*, into, through, over and along divers streets, courts, and passages, into a court called *Craven-court*, and so from thence into, through, over, and along a certain other court called *Northumberland-passage*, and from thence into, through, over, and along divers other streets and passages, unto and into a certain place called *Whitehall*, and so from thence back again, &c.; and also a certain other footway, passage, or thoroughfare leading from and out of a certain street called the *Strand*, in the said county, and through, over, and along divers streets, courts, and passages, into the aforesaid court called *Craven-court*, and so from thence, and through, over, and along the aforesaid court called *Northumberland-passage*, and from thence into, through, over, and along divers other streets, courts, and passages, unto and into the said place called *Whitehall*, all in the county aforesaid, and so from thence back again, through, over, and along the said last-mentioned streets, courts, and passages into the street called the *Strand* aforesaid, for all persons to go,

1. A public thoroughfare was stopped, whereby the plaintiff, a bookseller, whose shop was on the thoroughfare, suffered a loss of custom:—*Held*, sufficient special damage to entitle him to his action on the case.

2. By Statute it was provided, that no action should be brought "after six calendar months after the cause of such action should have arisen:—A nuisance was caused on

the 2d of *April*, and continued until the 2d of *July*, and the jury gave damages at the rate of 10*l.* per month; the action was not commenced until the 30th of *December*:—*Held*, that damages for two days only could be recovered, the action being brought too late to sustain the previous damage.

3. It was enacted, by a Statute made for the purpose of enabling a company to build a market, that it should be lawful for the company to build on part of a certain thoroughfare, provided another avenue was made on an adjacent spot; the company, for the purpose of carrying on their building, put up a barrier, which stopped the thoroughfare, and continued it for an unreasonable time:—*Held*, in an action for so stopping the thoroughfare, that the plaintiff need not complain that the company had stopped the old way and neglected to open the new one, but that it was sufficient to state in the declaration that the old way was stopped for an unreasonable time. *Goslee, J., dissents.*

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return, pass, and repass, every year, at all times of the year, at their free will and pleasure.

A second count stated that the plaintiff was possessed of a certain messuage and premises, situate partly in *Craven-street* and partly in *Northumberland-passage*, and next to the said public thoroughfare, in which said messuage the plaintiff carried on the trade of a bookseller, and was used to make, and did make, divers great gains by the sale of books and pamphlets to divers persons passing and repassing by his said messuage, by, through, and along the said thoroughfare.

Yet said defendants, well knowing the premises, but contriving and intending to injure the plaintiff in his said trade, and to prevent his customers from passing and repassing by and along the said thoroughfares, theretofore, to wit, on the 1st of *April*, 1832, and from thence for a space of eighteen calendar months then next following, wrongfully and injuriously kept and continued the said thoroughfares leading from the *Adelphi* aforesaid, to *Craven-court* aforesaid, and from the *Strand* aforesaid, to *Craven-court* aforesaid, and also one of the said courts in the said thoroughfares, to wit, *Craven-court* aforesaid, shut and closed up, the same being an unreasonable and unnecessary length of time, and thereby, during all the time aforesaid, obstructed the said thoroughfares (a) and hindered the plaintiff from carrying on his said trade in so large and beneficial a manner as he otherwise might and would have done, and thereby the plaintiff had, during all the time aforesaid, lost and been deprived of divers great gains and profits which might and otherwise would have arisen and accrued to him from carrying on his said trade in his said messuage, to the damage, &c.

Pleas:—First, Not guilty.

Second, That defendants did not keep and continue the said thoroughfares leading from the *Adelphi* aforesaid to *Craven-court* aforesaid, and the said court called *Craven-court* aforesaid, or any or either of them, shut and closed up, or obstruct the said thoroughfares, or either of them, and thereby hinder or prevent the plaintiff from carrying on the said trade, &c.; issue was joined on both pleas.

At the trial of the cause before *Tindal, C. J.*, at the *Middlesex* Sittings after *Trinity Term*, 1835, it was in evidence that the plaintiff kept a bookseller's shop at the corner of *Northumberland-passage*, immediately adjoining to the thoroughfare which had existed from the *Adelphi* to *Whitehall*; and that the defendants had commenced the erection of *Hungerford-market* under the authority of Statute 11 *Geo. 4, c. 70 (b)*.

(a) The argument was confined to the stopping of the way from the *Adelphi*, which constituted the main thoroughfare by the plaintiff's shop.

(b) The *Hungerford Market Company* was incorporated by this Statute, and by section 1, are liable to be sued by their corporate name. The two following sections of the Statute were referred to in the discussion of the case.

Sec. 64 enacts, "That in erecting the several buildings hereinbefore authorised to be erected, it shall be lawful for the said company to build on so much and such parts of the places called *One Tun-court*, *Heel-alley*, and *Charles-court*, as are

bounded by and included between any of the messuages and buildings hereinbefore authorised to be pulled down, and thereby to stop up the way and passage over the same parts of the said courts and alley. *Provided always*, that the said company do make an avenue from the said market to and in a straight line with *Duke-street*, in the *Adelphi*, of the width of twelve feet, and underneath some of the buildings to be erected in pursuance of this act, and do also make passages to the *York-buildings Wharf* from the said market, and also from *Villiers-street* in the *Strand*."

By sec. 93, "No action or suit shall be commenced or brought against any person

The obstruction commenced in *March*, 1832, and continued until the 2d of *July*, 1833, and it was caused by a high wooden fence which enclosed the site of the new buildings in the market. The plaintiff proved that the thoroughfare by his shop was stopped, and that the profits of his business had diminished by reason of the obstruction. Several applications to the defendants to open the way, or to construct a temporary passage, were proved; and contradictory evidence was offered as to the possibility of making such a passage without much expense or inconvenience, and as to what was a reasonable time for completing the undertaking. During the time that the obstruction continued the Company had built over the site of *Heel-alley*, and opened an avenue in a straight line with *Duke-street*, according to the provisions of the *sixty-fourth* section of the Statute (c). The new avenue was considerably to the south of *Heel-alley*.

The learned judge directed the jury that the main question was, whether the obstruction had existed for a longer time than was fairly necessary for the completion of the undertaking, and that the law annexed a tacit condition that the obstruction might exist for a reasonable time.

The jury found a verdict for the plaintiff, damages 30*l.*, being at the rate of 10*l.* per month from the 2d of *April*, 1833, to the 2d of *July* following.

The action was commenced on the 30th of *December*, 1833.

Kelly obtained a rule *nisi* to shew cause why the verdict should not be set aside and a nonsuit entered, or why the damages should not be reduced, upon three points, which were taken and reserved at the trial.—*First*, That the declaration did not properly describe the cause of action. *Secondly*, That the injury sustained was of a public nature, punishable only by indictment, *Hubert v. Groves* (d), where Lord *Kenyon* decided that the plaintiff, a coal and timber merchant, was not entitled to sustain an action on the case for a nuisance, although he was thereby prevented from carrying on his trade in as advantageous a manner as before. *Thirdly*, That the damages ought to be reduced to the amount of the damages sustained within six calendar months from the commencement of the action.

or persons for any thing done in pursuance of this act, or of any of the powers hereby given, until twenty-eight days' notice shall have been thereof given in writing to the defendant or defendants, signed by the attorney for the plaintiff or plaintiffs, or his, her, or their attorney, specifying the cause of such action, or after sufficient satisfaction or tender of amends shall have been made to the party aggrieved, or his or their attorney, by or on the behalf of the defendant or defendants, or after six calendar months next after the cause of such action shall have arisen; and any and every such action or suit shall be brought and tried in the county where the cause of action shall have arisen, and not elsewhere; and the defendant or defendants in every such action or suit shall and may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this

act; and if the same shall appear to be so done, or if such action or suit shall be brought before twenty-eight days' notice, which shall be given as aforesaid, or after sufficient satisfaction made or tendered as aforesaid, or after the time hereinbefore limited for bringing the same, or shall be brought in any other county or place than as aforesaid, then the jury shall find for the defendant or defendants; and upon such verdict, or if the plaintiff or plaintiffs become nonsuit, or shall discontinue his, her, or their action or suit, after the defendant or defendants shall have appeared, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, then the defendant or defendants shall recover costs of suit, and have such remedy for the same as any defendant or defendants hath or have for costs of suit in other cases at law."

(c) See page 282.

(d) 1 Esp. N. P. C. 148.

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Wilde, Serjt. and Merewether, Serjt. shewed cause.—This rule has been obtained on three grounds:—

First, That the plaintiff has not sustained such a particular special damage as entitles him to maintain this action. Now the declaration contains an averment of special damage, *viz.* that by means of the grievances the plaintiff had lost the profits of his trade as a bookseller, and that averment was proved at the trial. The principle established upon this subject is consistent and intelligible. If a way is stopped whereby two persons are detained, and one suffers only from the mere general interruption, he cannot maintain any action; but if the other had previously paid his fare by a coach, and by the interruption he lost his journey, an action for the special damage could be maintained.—[*Tindal, C. J.*—Can you produce any authority for that proposition? In the case you put the party could not have had notice that the other was going a journey, and you would seek to charge him with something which does not naturally follow as a consequence from his act.]—The authorities support the proposition, although there is no case exactly similar to that which has been supposed (*e*). But this case need not be carried to that extent, because the defendants well knew that the plaintiff kept his shop. In *Co. Lit.* 56 (a), the distinction between a common and a particular nuisance is laid down, and it is said, “If a man and his horse fall into the ditch, whereby he received hurt and loss, then for this special damage, which is not common to others, he shall have an action upon his case,” and the distinction is supported in many cases. *Fineux v. Hovenden* (*f*), *Maynell v. Saltmarsh* (*g*), *Paine, v. Partrick* (*h*), *Iveson v. Moore* (*i*), *Chichester v. Lethbridge* (*j*). And the more modern authorities conclusively establish that the present action can be supported. Thus in *Greasley v. Codling* (*k*) it was held that a higgler, who, with his asses laden with coal, was stopped by an obstruction in a way, whereby he went a circuitous route with his goods, might maintain his action, although it was not proved that the defendant had notice that he was coming that way. In *Rose v. Miles* (*l*), in error, the plaintiff’s barge, in going down a creek, was obstructed by the defendant’s barge, which was so moored across the creek that the plaintiff was compelled to carry his goods over land, and it was held that the plaintiff was entitled to maintain his action; and Lord *Ellenborough* said, “If a man’s time or his money are of any value, it seems to me that this plaintiff has shewn a particular damage.” In *Duncan v. Thwaites* (*m*), *Abbot, C. J.*, lays down the rule between a public and a special injury. *Wiggins v. Boddington* (*n*) is also in point. In this case special damage is alleged and proved. It is not the case of a person being injured in common with the public, but of one who seeks for damages for a special and particular injury.

(*e*) In *Paine v. Partrick*, *Carth.* 194, there is the following resolution:—“And as concerning special damages sufficient to maintain an action on the case, it was resolved, that if a highway is so stopped that a person is delayed in his journey a little while, and by reason thereof he is damaged, or some important affair neglected, this is not such a special damage for which an action on the case will lie; but a particular damage to maintain this action ought to be direct and not consequen-

tial; as, for instance, the loss of his horse, or by some corporal hurt in falling into a trench on the highway.”

(*f*) *Cro. Eliz.* 684.

(*g*) 1 *Keeble*, 847.

(*h*) *Carth.* 191; *S. C.* 3 *Mod.* 289.

(*i*) 1 *Lord R.* 486.

(*j*) 1 *Willes*, 71.

(*k*) 9 *Moore*, 489.

(*l*) 4 *M. & S.* 101.

(*m*) 3 *B. & Cres.* 584.

(*n*) 3 *Car. & P.* 541.

Secondly, It is said that the obstruction of the way was authorized by the Act of Parliament, and the *sixty-fourth* section (o) will be relied upon. But the effect of that section is to require the defendants to open the new passage before they stop up the old one, or at least these ought to be contemporaneous acts. In construing such Acts of Parliament it should be remembered that the language of the act is the language of the company. They know the extent of the authorities they require to complete their undertaking, and they are bound to give full notice of the extent of their powers. At all events, they cannot justify keeping the avenue closed for an unreasonable time; and the jury have found that the time was unreasonable.

Thirdly, It is contended that by the operation of the *ninety-third* section of the Statute (p), the damages must be reduced. The jury gave damages for three months, from the 2d of *April* to the 2d of *July*, 1833, on which last day the obstruction was removed. The action was not commenced until the 30th of *December*, 1833, and it is said that damages for the last two days only can be retained, because the action is required to be brought within six months after the cause of it accrued. But it would be unreasonable and oppressive upon a plaintiff, and cause unnecessary litigation, if it is not held sufficient to commence one action within the six months, and then show all the damage which has been sustained. The effect of a clause limiting the power to bring actions was considered in *Roberts v. Read* (q), and *Gillon v. Boddington* (r), and in the latter case *Abbot*, C. J. says, "I think that the case of *Roberts v. Read* is an answer, by way of authority, to the objection as to the limitation of the action, and I have great pleasure in finding that decision, as it shews the wisdom of the law in not too strictly adhering to the words of an Act of Parliament, where they would work injustice."

Kelly and Channell, in support of the rule.—The plaintiff is not entitled to recover, *First*, because the action is misconceived; for the allegation in the declaration is not supported by the evidence. The Statute gives the plea of the general issue (s), and the defendants are not bound to traverse the declaration; therefore the plaintiff is bound to prove all material allegations. The plaintiff states that there was, and still of right ought to be, a certain footway from the *Adelphi* to *Whitehall*, and that the defendants kept the said footway closed for an unreasonable time; but by the *sixty-fourth* section of the Statute, authority is given to build over and upon the footway which existed through *Heel-alley*, provided an avenue was made in a straight line with *Duke-street*. The site of *Heel-alley* has been built upon, and the avenue has been made in a straight line with *Duke-street*, which is to the south of *Heel-alley*. *Heel-alley* is now stopped up and always will remain so, and the jury were not entitled to find that a way was stopped up for an unreasonable time, which the Statute empowered the defendants to stop for ever. Therefore no such right of way as that which is stated in the declaration existed when the action was brought. Was the way ever legally stopped at all? There can be no doubt but that the *sixty-fourth* section authorized the company to stop it and to build upon it, and the opening of the new way was not a condition precedent to the stopping the old

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(o) *Ante*, p. 282.

(p) *Ante*, p. 282.

(q) 16 East, 215.

(r) 1 Car. & P. 541.

(s) *Vide ante*, sec. 93, p. 282.

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one. If the new way had not been opened, a mandamus against the defendants might have been obtained. At all events, if the action could be maintained at all, it would be for not opening the *new way* within a reasonable time.

Secondly, The injury complained of is of a public nature, which is the subject of an indictment. If a man should dig a trench across the *Strand*, and thereby impede the thoroughfare, he might be indicted for the offence, and if any individual happened to fall into the trench, and suffered a particular injury, he could maintain an action; but every shopkeeper in the *Strand* would not be entitled to maintain his action, although each may sustain some trifling loss. The principle laid down in *Hubert v. Groves* (t) is therefore founded on a sound principle; and an application in *Banco* for a new trial in that case was refused, although the counsel for the plaintiff, cited several cases.—[*Park, J.*—Those cases are not to be found by the references given (u).]—In *Rose v. Miles* (v) a distinction was taken by the Court, that there the plaintiff was interrupted in the actual enjoyment of the highway, and on that ground *Hubert v. Groves* was distinguished.

Thirdly, As to the reduction of the damages. The cases cited are not in point with the present. The words of the Statute are, that no action shall be sustained “after six calendar months next after the cause of action shall have arisen.” Did the cause of action for which this verdict has been obtained arise within six months? The answer is, that it did not, except as to the stoppage of the way for two days. The damages ought therefore to be reduced (w).

TINDAL, C. J.—I am of opinion that this rule must be discharged, except as to that part of it which relates to the reduction of the damages. The action is brought for the obstruction of a public footway. The declaration states that there was, and still of right ought to be, a certain public footway from the *Adelphi* into *Craven-court* to *Whitehall*, and the jury by their verdict have found that the way was obstructed on and after the 2d day of *April*, 1833. The first objection which has been raised is, that at that time the right of way so alleged to be in existence, had been extinguished by the provisions of the Act of Parliament; but such does not appear to me to follow as a consequence. The defendants rely upon the *sixty-fourth* section of the Act, and I observe that there is no particular power to stop up ways reserved in the Act, except that which is contained in this section, and there a right to stop the way is in a manner incidental to the power which is given to build upon the places therein described. The enactment is that it shall be lawful for the company to build on *One Tun-court*, *Heel-alley*, and *Charles-court*, “and thereby to stop up the way and passage over the same parts of the said courts and alley.” The only obstruction, therefore, which is here contemplated, is that which is to be occasioned in erecting the new buildings; but by the evidence given at the trial it appears that the obstruction was not caused by the new buildings, but by boards which had been put up by the company at an earlier period, and which were kept there until

(t) 1 Esp. N. P. C. 148.

(u) These cases are incorrectly cited in the report. *Hart v. Basset* is to be found in Viner's Ab. tit. “Chimney Private,” G.

7, cited in *Iveson v. Moore*, 1 Lord Ray. 491.

(v) 4 M. & S. 101.

(w) See *Massey v. Johnson*, 12 East, 67.

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the 2d of *July*, 1833. The obstruction, therefore, was not caused by erecting the buildings, but by putting up the boards, and keeping them up for a longer period than was necessary. Again, it is said, that the plaintiff should have framed his declaration differently; but it is to be observed that the immediate cause of the injury, which commenced on the 2d of *April*, was the existence of the board fence which was then erected, and which was allowed to remain for an unreasonable time beyond that which was authorized by the general power which the defendants had, to erect such a fence for the protection of the buildings. I therefore think the form of the declaration is sufficient. The next question is, whether the damage proved to have been sustained by the plaintiff, brings this case within that class of decisions which give a right of action, when a particular and private injury has been sustained: and I think it is a case of that description. The immediate injury to all the King's subjects is, that they are prevented from using the way as they had been accustomed to do; but from the time of the Year Books downwards, if a peculiar injury is sustained by any individual by the stoppage of a way, he may bring an action on the case. It may be observed that the plaintiff does not stand in the same situation as the rest of the public: he has not only a right to use the way himself, but he has also a shop, the custom belonging to which depends upon the thoroughfare. The case of *Baker v. Moor*, cited by *Gould*, J. in *Iveson v. Moore* (w), is like the present. That was an action on the case for stopping up a passage *per quod* the plaintiff lost the profit of his houses, and that was held to be special damage enough to entitle the plaintiff to recover. In fact that case is carried one step further than the present, for there the plaintiff had the houses, and his tenants refused to remain in them; but in all these cases the only question is, whether the injury is so proximate as to be the direct, necessary and immediate consequence of the act of the defendants. I admit that it is difficult to distinguish *Hubert v. Groves* (x) from the cases which were there cited before Lord *Kenyon*, and which have been cited in the course of this argument; but I yield to the greater authority of the decisions which have preceded and succeeded that case.

The third point is, whether the whole of the damages given at the trial ought to be retained. The jury have given damages from the 2d of *April*, 1833, to the 2d of *July* following, and the action was commenced on the 30th of *December* in the same year. The *ninety-third* section of the Statute requires that all actions shall be commenced within six calendar months after the cause of action shall have arisen. Here the six months had run with the exception of two days, and although the nuisance began in *April*, and was continued until the 2d of *July*, yet each succeeding day was a continuing of the nuisance, and we must construe the Act as we find it, and therefore the plaintiff cannot recover damages for a longer period than the two days.

PARK, J.—It is said that this action is not maintainable because there is not sufficient proof of special damage. I cannot but feel the difficulty of the case of *Hubert v. Groves* (x), bearing in memory, as I do, the learning and ability of the great judge who decided that case; but looking at the authorities before and since that period, I think *Hubert v. Groves* is not entitled

(w) 1 Lord Ray. 491.

(x) 1 Esp. N. P. C. 148.

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to the same weight as most of the other decisions of Lord *Kenyon*, for it is impossible to distinguish *Iveson v. Moore* (y), and *Baker v. Moor*, there cited, from the present case. It is true that in *Iveson v. Moore* the judges were of different opinions, but it appeared that they all agreed upon the principle of the case, and only doubted whether special damage had been proved, and the case was afterwards argued before all the judges, and they agreed that the action would lie. *Baker v. Moor* is almost precisely like the present case; the damage there laid is, that in consequence of the stoppage of the way the plaintiff could not enjoy the profits of his houses; so here, the customers could not get to the plaintiff's shop, whereby he sustained a loss in his profits as a bookseller. Since the case of *Hubert v. Groves* (z), *Rose v. Miles* (a) has been decided, and it is an extremely strong case in favour of the plaintiff. *Greasly v. Codling* (b), and *Wiggins v. Boddington* (c), also recognise the principle laid down in the former cases; and I therefore agree that our judgment upon this point must be for the plaintiff. As to the objection to the form of the declaration, I agree with the observations which have been made by my lord: I also reluctantly concur that the damages must be reduced.

GASELEE, J.—I agree with the Court upon two of the points which have been discussed, but on that which relates to the description of the cause of action, set out in the declaration, I do not concur. This was a continuing nuisance, and it seems to me that the *gravamen* of the charge for which the defendants were liable, was for not making the new way in a reasonable time, and the declaration, as it stands, does not reach the merits of the case. It was not a condition precedent under the terms of the Statute, that the new way should be opened before the old avenue should be closed, but the defendants were bound to carry the provisions contained in the Statute into effect within a reasonable time.

BOSANQUET, J.—One objection which has been made to the plaintiff's right to recover in this action is of a technical nature, and totally unconnected with the merits of the case, and I cannot but regret that the defendants should have taken such an objection. The *sixty-fourth* section of the Statute authorizes the defendants to build on certain courts and on an alley, which are particularly mentioned, and to do so they were authorized to shut up the avenue for a reasonable time, and at the expiration of that reasonable time the act of the defendants became unlawful. If the defendants had pleased they might have built on the site of the old way, and yet have left a thoroughfare over it, and then it could not be considered as a new way. But if they preferred to make a new way, it was provided for by the section; and this action is brought for a continuance of the obstruction of the thoroughfare, and it seems to me that there is no foundation for the first objection. As to what is a sufficient private injury to entitle a party to recover where the nuisance is also of a public nature, the difficulty arises in the application of the principle. Extreme cases may be put, but the Court must endeavour to trace out in what manner the principle has been applied in former cases.

(y) 1 Lord Ray. 487.
 (z) 1 Esp. N. P. C. 148.
 (a) 4 M. & S. 101.

(b) 9 Moore, 489.
 (c) 3 Car. & P. 544

Here the plaintiff was the owner of a shop, in which he carried on his trade; he complains, not that he is prevented from passing along the way, which is an injury he has sustained in common with the public at large, but that in the course of his trade his customers have been prevented from passing his shop, whereby he has lost his profits; and this is a peculiar injury which the plaintiff has sustained. The strongest case in favour of the defendants is *Hubert v. Groves* (d); and without wishing to refine upon that decision, I admit that it is a very strong case; for there the plaintiff was carrying on his trade of a coal and timber merchant, and was prevented from carrying on his trade in so advantageous a manner as he had been accustomed to do; but we must see whether that case has been sanctioned by other decisions. Without dwelling upon *Iveson v. Moore* (e), where there was a difference of opinion between the judges, I agree that *Baker v. Moor*, there cited by *Gould, J.*, is a very strong authority, because there the injury was to the deterioration of the plaintiff's property; and in the present case the plaintiff's customers were prevented from coming to his shop, whereby he was deprived of his profits. The next authority is *Rose v. Miles* (f). What was the act complained of there? It was mooring a barge across a creek. What was the private injury sustained? That the plaintiff was prevented from navigating his barges up the creek, whereby he was compelled to convey his goods over land, and to expend money in the carriage; special damage being therefore shewn, as in the other cases, the action was held sustainable. Again, in *Greasley v. Codling* (g) it appears that the plaintiff was a higgler, and brought coals by the road, but in consequence of the stoppage of the way he was obliged to go a more circuitous route, and was put to expense. Upon the third ground, I agree that the damages ought to be reduced. It was necessary that the action should be brought within six months after the cause of action arose. It was a continuing nuisance up to the 2d of *July*, 1833, and the action was not commenced until the 30th of *December*, leaving only two days uncovered.

Rule accordingly.

(d) 1 Esp. N. P. C. 148.
(e) 1 Lord Ray. 487.

(f) 4 M. & S. 101.
(g) 9 Moore, 489.

MOON and an^r Assignees of FISHER, a Bankrupt, v. RAPHAEL, Esq., and an^r.

Nov. 4th.

TROVER against the Sheriff of *London* to recover certain household goods and chattels, the property of the plaintiffs, as assignees.

Pleas.—*First*, Not guilty.

1. The sheriff seized goods belonging to a bankrupt, and after keeping

them for a considerable period, and after an action of trover in the usual form had been brought against him by the assignees, he delivered up the goods to them:—*Held*, that the assignees were not entitled to proceed in the action and to recover as damages a quarter's rent which they had paid for the house where the goods were kept whilst in the possession of the sheriff, or the costs of keeping their messenger on the premises during the same period.

2. A sheriff's officer proved that he had seized goods under a warrant on a *fi. fa.* which was brought to him by his man, who told him that he had obtained it from the sheriff's office. The officer also stated that he knew the handwriting on the warrant, which he had subsequently lost:—*Held*, that this was sufficient evidence to prove that the officer acted under the authority of the sheriff.

3. The notice of disputing the petitioning creditor's debt, the trading, or the act of bankruptcy, as required in certain cases by sec. 90 of the Bankrupt Act, 6 Geo. 4, c. 16, must be given, although, under the new rules of pleading, the denial of the bankruptcy may appear upon the record.

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Second, That the plaintiffs were not possessed of, or entitled to the said goods as such assignees.

Third, That the said *Fisher* did not become bankrupt according to the form and effect of the Statute in force, concerning bankrupts, in manner and form, &c.; whereupon issue was joined.

The action was commenced on the 18th of *April*, 1835, and it was tried before *Gaseles*, J., at the Sittings for *Middlesex* after *Trinity Term*. It was in evidence that the goods were seized by the defendants, the sheriff of *London*, under a *fi. fa.*, and *Levi*, the sheriff's officer, stated that he made the seizure on the 21st of *November*, 1834, but that he kept only a walking possession until the 21st of *January*, after which period he put a man on the premises, who remained there until the 2d of *May*, when the goods were delivered up to the plaintiffs, after the defendants had failed in obtaining relief under the Interpleader Act. The messenger under the *fiat* came on the premises on the 23d of *January*.

Levi also stated that he did not receive the warrant to levy from the sheriff's office, but that it was given to him by one of his men, and that he had lost the warrant; he also said that he knew the handwriting on the warrant. The proceedings in bankruptcy were proved at the trial, and the plaintiffs shewed that the messenger's charges for keeping possession of the goods amounted to 20*l.*, and that they had paid one quarter's rent of the bankrupt's dwelling-house, in consequence of the goods having remained in the possession of the sheriff's officer. Upon these facts it was objected for the defendants,

First, That as the plea disputed that *Fisher* became bankrupt, it amounted to a notice of disputing the bankruptcy within sec. 90 of the 6th *Geo. 4. c. 16 (a)*, and that the production of the proceedings in the bankruptcy was therefore not sufficient proof of the plaintiffs' title.

Secondly, That the evidence of the sheriff's officer, without the production of the writ or warrant, or other evidence to shew any connexion between the officer and the sheriff, was insufficient to charge the defendants; and,

Thirdly, That as the goods were returned to the plaintiffs after the action was brought, no more than nominal damages could be recovered.

The learned judge reserved these points. The jury found a verdict for the plaintiffs, damages 60*l.*, which included the costs of keeping the possession, and the amount of the quarter's rent.

R. Alexander moved for a nonsuit or a new trial, or to reduce the damages to one shilling, on the grounds which were taken at the trial.

First, The proof of the plaintiff's title was insufficient. Before *Reg. Hl. T.*, 4 *Wm. 4.* the plea of the general issue traversed all the facts in the declaration; and if sec. 90 of the Bankrupt Act had not required notice to be given, the petitioning creditor's debt, the trading, and the act of bankruptcy.

(a) Sec. 90 enacts, "That in any action by or against any assignee, or in any action against any commissioner or person acting under the warrant of the commissioners for any thing done as such commissioner, or under such warrant, no proof shall be required at the trial of the petitioning creditor's debt or debts, or of the trading, or act

or acts of bankruptcy respectively, unless the other party in such action shall, if defendant at or before pleading, and if plaintiff, before issue joined, give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some, and which of such matters."

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must have been proved. But now that a defendant is allowed by his plea to dispute the bankruptcy, and as this plea denies that *Fisher* became bankrupt, it amounts to the notice which was required by the *ninetieth* section of the Statute, and the plaintiff ought to have proved each of the ingredients which constitute a bankruptcy. In *Trimley v. Unwin* (*b*), the Court gave full effect to the rule, that all the necessary ingredients must be proved, if notice is given; and although this plea may deny the bankruptcy in terms which are too general, that was only cause of demurrer.

Secondly, The evidence of the sheriff's officer was insufficient of itself to shew that the defendants were liable. Neither the warrant or a copy of it was produced; no person was produced from the sheriff's office to prove that such a warrant had been granted, or that any writ was issued: nor was the man who brought it to the officer examined to prove that fact.—[*Park, J.*—The document was lost, and parol evidence of its contents was given in the usual way. The officer said that he knew it was a warrant from the sheriff, because he was acquainted with the handwriting upon it.]

Thirdly, The damages ought to be reduced to one shilling. The declaration is in trover to recover certain chattels; all these chattels have been given up to the plaintiffs, and they have accepted them. The declaration does not contain any allegation of special damage.

TINDAL, C. J.—In this case the proceedings in the bankruptcy were proved in the usual manner: but it is objected that as the plea denies that the party became bankrupt, the proof of the proceedings was insufficient. The question therefore is, whether, when no notice of contesting the bankruptcy has been given in pursuance of the Statute, it makes any difference if the plea contains a denial of the bankruptcy? and I am of opinion that it makes no difference. The *ninetieth* and *ninety-second* sections of the Statute contain express provisions that unless notice is given, a certain mode of proving the proceedings in the bankruptcy shall be sufficient, and that law stands unrepealed by the subsequent rules of court which relate to pleading. The point as to the evidence of the sheriff's officer has been disposed of during the argument, and this rule must be granted only on the objection which has been taken to the amount of damages.

PARK, J.—It was not intended that the new rules of pleading should alter the medium of proof in establishing a bankruptcy. The *ninetieth* section of the Statute requires that the notice should specify which of the matters relating to the bankruptcy is intended to be disputed, and the new rules do not alter the law upon this subject.

GASELEE, J.—The new rules of pleading were framed to shorten the proofs at a trial, and not to make more evidence necessary.

BOSANQUET, J.—I am of opinion that this plea does not dispense with the notice required by the Statute.

Rule refused on the *first* and *second* points, and *granted* on the *third*, against which, on a subsequent day,

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Talfourd, Serjt., and *E. V. Williams*, shewed cause.—This verdict for damages can be supported upon principle. It is important that the goods were given up after the commencement of the action, and delivery operates only to mitigate the damages. In the *Countess of Rutland's* case (c) it is said, "If a man takes my horse and rides it, and afterwards redelivers it to me, I may still have an action against him, for this is a conversion, and the redelivery is no bar to my action: it shall only go in mitigation of the damages." And *Buller*, J., in *Syeds v. Hay* (d) says, "If a person take my horse to ride, and leave him at an inn, that is a conversion; for though I may have the horse on sending for him, and paying for the keeping of him, yet it brings a charge on me." Lord *Mansfield*, in *Fisher v. Prince* (e), observes, "In trover for money numbered, or in a bag, the Court has ordered it to be brought in: yet the jury may give more in damages; they may allow interest, and in some cases they ought." In *Gibson v. Humsfrey* (f), the Court refused to stay the proceedings in an action of trover to recover furniture and fixtures, although the defendants offered to pay the produce of the furniture, and to replace the fixtures; and Lord *Lyndhurst*, C. B. observes, "We cannot prevent these plaintiffs from trying by a jury the amount of damage which they allege themselves to have suffered from the sale of the fixtures in any particular manner. We cannot assume the province of a jury in estimating that damage." And to the same effect is the opinion of *Best*, C. J., upon a similar application in *Tucker v. Wright* (g). In *Greening v. Wilkinson* (h), *Abbot*, C. J., said, "I am of opinion that the price of an article on the day of the conversion is by no means the criterion of the damages." All these cases shew that the delivery of the chattel sought to be recovered operates only in mitigation of the damages. As to the objection that the special damage ought to have been stated in the declaration, the answer is, that the extent of the damage was not known when the declaration was delivered, and the goods were not given up until after action brought. In this case, if the defendants had not retained the possession of the goods, the plaintiffs would not have been compelled to pay the rent to the landlord, or to keep the messenger in possession, but the goods would have been sold for the benefit of the estate.

R. Alexander and Butt, *contrâ*.—The plaintiffs would have been obliged to pay the rent to the landlord, if the goods had not been retained by the defendants.—[*Tindal*, C. J.—Did that appear in evidence?—]It was neither asserted or denied at the trial, and the plaintiffs were bound to shew it distinctly. But on another ground the special damage cannot be recovered.—[*Tindal*, C. J.—You say that the damages do not follow as a natural and necessary consequence.]—Exactly so. This declaration contains no averment of special damage. If any such damage had been sustained, it ought at least to have been stated in the declaration. Thus, in *Sippora v. Bassett* (i), it was held that in trespass for taking a horse, nothing can be given in evidence but what is expressed in the declaration. The goods are given up by the defendants undeteriorated, and the plaintiffs have accepted them in satisfaction.—Stopped by the Court.

(c) 1 Rolle Abr. tit. "Action on the Case," L. 1.

(d) 4 T. R. 260.

(e) 3 Burr. 1363.

(f) 3 Tyrr. 588.

(g) 3 Bing. 601.

(h) 1 Car. & P. 625.

(i) 12 Vin. Abr. tit. "Evidence," T. b. 6.

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TINDAL, C. J.—This rule to reduce the damages to one shilling must be made absolute. This is an action of trover to recover damages for detaining certain property, and before trial the defendants delivered up the whole of the property to the plaintiffs, who accepted it. The plaintiffs were not bound to accept the goods; they might have stood their ground and have proceeded with their action. It has been the practice of the courts, for at least the last century, for the jury, in ordinary actions of trover, to give merely nominal damages, if the goods are returned to the plaintiff. But it is said that special damage has been sustained; that in consequence of the chattels having been kept in the bankrupt's house, the plaintiffs have been compelled to pay a quarter's rent. Now, this is not a damage which is necessarily incidental to the wrongful taking of the property, and the declaration is in the common and ordinary form, without any statement of special damage, and we are not called upon to say whether, in a declaration in trover, such a statement may or may not be inserted. Cases have been cited to shew that where goods have been returned, damages may notwithstanding be recovered. I agree entirely with those cases, for there an actual damage was sustained which was the necessary consequence of the conversion. Thus, in the *Countess of Rutland's* case (*j*) the injury which was done to the horse by riding it might have been of a serious description. So in *Sydes v. Hay* (*k*); it is true the horse might have been obtained by its owner; but to recover it he is obliged to pay a sum of money, and this is a necessary and immediate consequence of the conversion. The other cases which have been cited carry the point no further than this—that the Courts will not in all cases compel the plaintiff to take back the chattels, sought to be recovered, in satisfaction of the action. But the damage here proved was not necessarily consequent upon the conversion of the chattels, and, if it could be recovered at all, it ought to have been stated on the face of the declaration.

PARK, J., concurred.

GASELEE, J.—I doubted at the trial whether this evidence ought to have been received; but I followed the usual course, and left the point for the opinion of the Court. There is no statement of the special damage in the declaration: and I have known objections made to an averment of special damage in an action of trover, but it is not now necessary to say whether it would be allowed or not. I agree with the judgment of the Court.

Rule absolute (*l*).

(*j*) 1 Roll. Abr.

(*k*) 4 T. R. 280.

(*l*) Mr. J. Bosanquet was sitting as one of the Lords Commissioners of the Great Seal.

EDWARDS v. BARNES and an^r.

Nov. 13.

THIS was an action on promises, brought by the plaintiff as the purchaser, by auction, of certain ground-rents arising out of certain lands, principally copyhold, but a small part freehold, situate at *Brixton*, and *Upper Tulse-*

leasehold, and all my money, securities for money, stock in government funds, goods, chattels, and all other my property whatsoever and wheresoever, to hold the same unto and for the use of *A.*, her heirs, executors, administrators, and assigns for ever:—*Held*, that the testator's copyhold estates passed to the devisee.

A testator gave, devised, and bequeathed unto *A.* "all my freehold and

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Hill, Surrey, sold by the defendants to the plaintiff on the 27th of *June*, A.D. 1834, on certain conditions, and the breach assigned in the declaration was this: that at the time of such sale the defendants had not, nor could they procure any such title to the said copyhold premises from whence the said ground-rents arose, as enabled them to make a valid and effectual conveyance of the said ground-rents. The defendants pleaded that at the time of such sale they had and were able to procure such a title as enabled them to make a valid and effectual conveyance thereof according to the said conditions, and thereupon issue was joined. The facts were as follows:—In 1808 *J. Doubtfire* was seized in fee of the said freehold premises, and was also seized in his demesne as of fee, according to the custom of the manor of *Lambeth*, of the said copyhold premises (out of which said freehold and copyhold lands the ground-rents in question issue); and in 1810, he was admitted to the said copyholds, and at the same time *surrendered the same to the use of his will*; and at the time of making his will, as hereinafter mentioned, continued so seized of the said freehold and copyhold premises, and was also possessed of certain leasehold property in *Muffett-street* and *Cross-street, Middlesex*, and at *Brixton Causeway*, and *Nelson-square, Surrey*, and of a ground-rent of 11*l. per annum*, issuing out of another house at *Nelson-square* aforesaid, and was not seized or possessed of any other land or ground-rents whatsoever; and being so seized and possessed, on the 6th day of *August* 1823, he made and published his will in writing, duly executed, as follows:—

I, *J. Doubtfire*, of the parish of *Stoke Damarel*, in the county of *Devon*, gentleman, being of sound mind and memory, and understanding, do make and publish and declare this my last will and testament in manner following, that is to say I give, devise, and bequeath unto my wife, *M. D.* all my freehold and leasehold, and all my money, securities for money, stock in government funds, goods, chattels, and all other my property whatsoever and wheresoever, to hold the same unto and for the use of my said wife *M. D.*, her heirs, executors, administrators, and assigns, for ever, subject nevertheless to the payment of nearly 60*l. per annum*, to my sister *S. Hendey*, of one annuity arising from part of the ground-rents payable to me out of my manor of *Brixton*, in the county of *Surrey*, and of the other part out of the ground-rents payable to me from *Muffett-street* and *Cross-street, City-road*, to hold the said annuity or sum of nearly 60*l. yearly*, unto my said sister, *S. Hendey*, her heirs and assigns for ever; and I constitute and appoint my said wife, *M. D.* my sole executrix of this my last will and testament, hereby revoking all former wills by me made. In witness whereof, I have to this my last will and testament set my hand and seal, this 6th day of *August*, 1823.
(Signed, &c.)

The said *J. Doubtfire* died very shortly after making his said will, and the same was duly proved. There never was any such manor as the manor of *Brixton*; previously to the making of the said will, no part of his freehold, leasehold, or copyhold property was subject to any annuity. At the time of the death of the said *J. D.* the ground-rents payable to him out of his leasehold property in *Muffett-street, City-road*, and at *Brixton Causeway*, amounted to 50*l.* a year, after deducting 1*l.* payable annually for ground-rent in respect of the same; and the freehold lands at *Brixton* were worth about

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10*l*. a year. After the death of the said *J. D.*, *M. D.*, his widow and devisee, entered into the receipt of the ground-rents arising out of the freehold and copyhold premises at *Brixton* and *Upper Tulse Hill*, and continued in receipt thereof until the time of her death, and was admitted to the said copyholds; and in *May*, 1824, surrendered the same to the use of her will. After the death of the said *J. Doubtfire*, by indenture made the 7th of *September*, 1824, after reciting that the said *J. D.* never was possessed of the manor of *Brixton*, and that the messuages, tenements, and hereditaments in *Moffett-street* and *Cross-street*, in the will mentioned, and those in the said will denominated as his manor of *Brixton*, and ground-rents payable to him therefrom or thereout, and thereby intended by the said *J. D.* to have been charged with the payment of the said annuity of nearly 60*l*. given by the said will to the said *S. Hendey*, then produced the clear yearly rent of only 50*l*., and that it had been agreed between the said *Sarah Hendey* and *M. D.*, that the said *S. H.* should have and receive an annuity of 50*l*. out of the several messuages and tenements, and which was the full amount of the clear yearly ground-rents payable in respect of the said premises; the said *S. H.* covenanted with the said *M. D.* that she would take an annuity of 50*l*. out of certain leasehold premises therein described as situate in *Moffett-street*, and *Brixton Causeway*, and as having been leased by the said *J. D.*, in full discharge of the annuity given her by the will of the said *J. D.* And the said *S. H.* did thereby release all the other messuages of the said *J. D.* from the payment of the same. And in the year 1834, the said *M. D.* made her will, and thereby gave and devised all her freehold, copyhold, and leasehold messuages, lands, hereditaments, and real estates to *J. Knapman* and *J. Doubtfire*, &c.

The defendants sold the said ground-rents to the plaintiff by the direction and authority of the said *J. K.* and *J. D.*

The question for the opinion of the Court was, whether the said copyhold property situate at *Brixton* and *Upper Tulse Hill* passed by the devise thereof in the will of the said *J. D.* to his widow *M. D.* or not?

J. Bayley, for the plaintiff.—The copyhold estate did not pass by this will. The words used are, “I give, devise, and bequeath unto my wife all my freehold and leasehold, and all my money, securities for money, stock in government funds, goods, chattels, and all other my property whatsoever and wheresoever;” the words freehold and leasehold are clearly insufficient to pass copyhold. Then the question is, whether it is included in the description of “other property.” Now the devise cannot be divided into three branches, for the first would be “my freehold and leasehold;” the second “my money, goods, *and* chattels;” and the third “and all other my property.” But as the word “and” is omitted in the second branch, the words “other property” must form part of it, and then it would refer to other property of a similar nature, as money, goods, &c., before mentioned. *Dally v. King* (a), is an authority that the words “estate of what kind soever” will not pass a remainder in fee.—[*Tindal*, C. J.—The Court did not give judgment on that point].—It is said that the Court seemed to acquiesce in the argument. Again, in *Baylis v. Gale* (b), where the word “estate” was used generally. In *Timewell v. Perkins* (c), where the words were “and all other

(a) 1 H. Black. 1.

(b) 2 Vesey, 51.

(c) 2 Atk. 102.

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the residue of my estate, consisting in ready money, &c., or in any other thing whatsoever and wheresoever;" the Court said they would intend an intestacy in favour of the heir at law, unless there was a clear intention to pass the real estate under the words of the devise, which they held did not sufficiently appear. In *Doe d. Bunny v. Rout* (d), it was held that the words "and every other thing my property of what nature or kind soever," did not include the testator's land. In *Roe d. Helling v. Yeud* (e), it was said that real estate did not pass under the following words, "all the remainder of my property whatsoever and wheresoever;" and Sir J. Mansfield, C. J., said, that "the proof of intention laid on the devisee." *Chapman v. Prichett* (f) is a strong authority, as far as it goes. There the testator devised "his freehold messuages, stock in the funds, and all shares in property which he might be possessed of, or entitled to," and this Court held that the copyhold estate did not pass.

Hoggins, contra.—The words used in this will are clearly sufficient to pass the copyhold estates. In *Doe d. Morgan v. Morgan* (g), real estates were held to pass under the word "property;" and Lord Tenterden, C. J., says, "This is the will of a very unlettered person. I believe it is not unusual for such a person to use the word property to denote all that he has, real and personal. Our decision certainly ought not to be governed by that consideration. But it has been decided in many cases that in a will the word property is of itself sufficient to pass real estate, unless there be something in other parts of the will to shew clearly that that word was used in a more confined sense." In *Doe d. Andrew v. Lainchbury* (h), a devise of all the residue of the testator's money, stock, property, and effects of what kind or nature whatsoever, was held to pass his real estate. In *Doe, Lessee of Wall v. Langlands* (i), the testator "gave and bequeathed all and every the residue of his property, goods and chattels," to be divided equally between A. and B.; and although the word property was followed by "goods and chattels," it was held that the real estate passed. In *Doe d. Burkill v. Chapman* (j), the devise was "all the rest and residue of my estate, of what nature or kind soever;" and the Court held that they could not restrain the meaning of the words to personal property, and negative the operation of them as to real estates. The observation of Sir Thomas Plumer, in *Patton v. Randall* (k), is to the same effect as the cases cited. He observes "the children are to share all his *property*; this term must comprehend his real and personal estate, and I think, therefore, that the general residue is given to the children equally, in language that by the recent cases would certainly pass to them the fee." And by an attentive perusal of this case it will appear that the testator intended to refer to his copyhold estate in the charge of the annuity, which shews that he had it in his contemplation when he made his will.

Bayley, in reply.—*Doe d. Morgan* (g), is distinguishable from the present case, because the Court decided upon the ground that it was the manifest

(d) 7 Taunt. 79.
 (e) 2 N. Rep. 214.
 (f) 6 Bing. 602.
 (g) 6 B. & Cres. 512.

(h) 11 East, 290.
 (i) 14 East, 370.
 (j) 1 H. Black. 223.
 (k) 1 Jac. & W. 195.

ntention of the testator to dispose of all his property. But here, by mentioning the freehold and leasehold property, an intention to exclude the copyhold is manifest. In *Doe d. Andrews v. Lainchbury* (1), it appeared from other parts of the will that the testator applied the words "property and effects" to real estate. In the present case the words "all other my property," follow words describing a chattel interest.

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TINDAL, C. J.—I think the words used by the testator are sufficient to warrant us in saying that the copyhold estates passed under this devise. The object is to ascertain the intention of the testator, and looking at the words which are used in the devise, and at the general scheme of this will, and at the other circumstances, it is impossible but to see that it was the intention of the testator to pass all his real estates. *Doe d. Andrew v. Lainchbury* (1), which is the only case I shall refer to, is a very strong authority in favour of the defendants, for there, under the words "property of what kind or nature whatsoever," the testator's real estates were held to pass. The words used in the will before us are "all my freehold and leasehold, and all my money, securities for money, stock in government funds, goods, chattels, and all other my property whatsoever and wheresoever." It is said that under the words, all my freehold and leasehold property, the copyholds would not have passed; but if we find in a subsequent part of the devise the words "all other my property whatsoever and wheresoever," there is no necessity for diminishing the force and effect of the word property. But it is ingeniously said that the devise cannot be divided into three branches, for then the second would be "and all my money, &c., goods and chattels," and that as the word "and" is omitted, "all other my property" must be considered to apply to such chattel interests as precede those words; there is certainly some force in that observation, but it would be hypercritical to give that nice construction to this devise, for if the testator had been asked what other property he had to dispose of, he would have been greatly puzzled to give an answer. Again, if we look at the following part of the will, we find the words are "to hold the same unto and for the use of the said *Mary Doubtfire*, her heirs, executors, administrators and assigns," whereby it would appear that the testator intended that his estate and effects should go to the heir or executors, according to the nature of the property. And if we decide this case upon the construction of the words themselves, we adhere to former authorities when we say that the word property is used in its largest and most comprehensive sense, for I am not disposed to give too much weight to the circumstance that the copyholds had been surrendered to the use of the testator's will. Nor do I place much reliance upon the supposed reference to the copyholds in the grant of the annuity, because I do not see my way clear upon that point; but for the reasons already given, I am of opinion that our judgment ought to be for the defendants.

GASELEE, J.—I am of the same opinion. The course has lately been to give a greater effect to the word property, and this case may be decided on the authority of *Doe d. Andrew v. Lainchbury* (1), for here the words are nearly the same as they are in that devise.

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BOSANQUET, J.—I think the intention of the testator was to dispose of all his property, whatsoever and wheresoever, real and personal. The word property, has of late been held to pass all the estates of the testator. Here the testator enumerates the sorts of property which he possesses; he enumerates freehold and leasehold; his money, securities for money, and other personal estate; and he then says "and all other my property whatsoever and wheresoever;" which seems as if he meant to say, If I have any other property than that which I have enumerated, I give it to my devisee. It has been observed that this devise cannot be divided into three branches, and at first sight this seems to be so. There could have been no doubt raised if the words had been "goods and chattels." But I think it would be much too nice a distinction to say that if the word "and" is omitted, the construction should be different in a case like the present. The view which is taken of the devise is much strengthened by the words which follow, for the testator adds, "to hold the same unto and for the use of my wife, her heirs, executors, administrators and assigns for ever," thereby meaning to distinguish the different descriptions of property before devised. I therefore agree that the copyhold estates passed by this will.

Judgment for the defendants (m).

(m) Mr. J. Park was at chambers.

Nov. 26th.

SHARPE v. JOHNSTON.

1. The jurat of an affidavit sworn before a commissioner for taking affidavits in the Irish courts, residing in Ireland, must be verified by proof of his authority and signature.

2. Qu. whether since 3 & 4 Wm. 4, c. 42, sec. 42, affidavits made in Ireland are not required to be sworn before a commissioner who is appointed by the English judges under that Statute.

3. The rule requiring the addition of the party making an affidavit (H. T. 2 Wm. 4, No. 5) does not extend to affidavits made by defendants in custody.

HURLSTONE applied for a rule *nisi*, to discharge the defendant out of the custody of the warden of the *Fleet*, upon the following grounds. The affidavit to hold to bail, made at *Athlone*, in the county of *Roscommon, Ireland*, contained the following jurat. Sworn, &c. "before me, *John Gaynor*, a commissioner for taking affidavits in the said Court of *Common Pleas* in the said county." The list of commissioners appointed by this Court under Stat. 3 & 4 W. 4, c. 42, s. 42 (a), had been searched, and it appeared that Mr. *Gaynor's* name did not appear upon it (b); a letter had also been written to Mr. *Gaynor*, requesting him to say if he was a commissioner for taking affidavits in the English courts, and an answer had been received from him stating that he was only a commissioner for the Irish courts.—[*Tindal*, C. J.—These facts are *dehors* the instrument].—But the jurat is irregular upon the face of it, for the hand-writing of the commissioner ought to have been verified; and it ought also to have been verified that he had authority to administer oaths.

W. H. Watson shewed cause.—The affidavit upon which this motion is founded, made by the defendant, does not contain his addition, he merely describes himself as being in the custody of the warden of the *Fleet*, and that he has obtained a day-rule for the purpose of attending at the judge's chambers to make the affidavit. But by rule *Hil. T.*, 2 W. 4, No. 5, it is

(a) Which directs that the judges shall have the same powers for granting commissions for taking and receiving affidavits in *Scotland* and *Ireland*, as they then had in the counties in *England*, and by virtue of the Statutes then in force.

(b) The Lord Chief Justice intimated that he should order a register to be made of the names of these commissioners.

ordered, "the addition of every person making an affidavit shall be inserted therein;" and in *Lawson v. Case* (c), that rule was held to apply to a defendant as well as other persons.

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Wilde, Serjt., contra.—This is the case of a prisoner in the custody of the Court, and the words of the rule would require that the residence of the party must be given, which is ridiculous where the deponent states himself to be a prisoner. In *Jackson v. Chard* (d) the rule was held not to apply to a defendant.

TINDAL, C. J.—The object of the rule is to enable deponents to be found if it should be necessary, and although I am for adhering in all cases to the letter and the spirit of the rules of Court, yet I can see very clearly that this case is an exception which must be engrafted upon it. When a person describes himself as being a prisoner in the *Fleet*, and absent on a day-rule, I do not see how he is to give any further description of the place of his abode.

PARK, J.—The word "addition" not only means the occupation of the party, but also the place of his abode, and I agree that in this particular case the affidavit is sufficient.

W. H. Watson proceeded to shew cause.—It has always been held sufficient if an affidavit is made before a person having competent authority to administer oaths. Thus in *Omealy v. Newell* (e), where the extent of the authority of the courts to hold to bail is very elaborately discussed by Lord *Ellenborough*, the affidavit was sworn before a magistrate at *Paris*; in *French v. Pellew* (f), before the Chief Justice of the *King's Bench*, in *Ireland*; and in *Ellis v. Sinclair* (g), before a magistrate in *Scotland*.—[*Tindal, C. J.*—All these cases are before the new Statute; now there is a preferable mode of swearing affidavits in *Scotland* and *Ireland*.]—The new Statute will not oblige a party to traverse the country until he is able to find a commissioner appointed under the new Statute. In remote districts it would occasion much inconvenience.

Wilde, Serjt. and Hurlstone were stopped by the Court.

TINDAL, C. J.—This case may be disposed of upon one single point. It is established that Mr. *Gaynor* is not a commissioner appointed by this Court; but that need not be considered, for if, as a commissioner of the *Common Pleas* of *Ireland*, he was authorized to take this affidavit, his signature ought to have been verified on oath; as that has not been done, the rule must be made absolute on that ground.

PARK, J.—If an affidavit is made before the Lord Chief Justice of *Ireland*, an affidavit to verify his hand-writing must accompany it (h); and there-

(c) 1 Cr. & Meeson, 481.

(d) 2 Dow. P. C. 469.

(e) 8 East, 364.

(f) 1 M. & S. 302.

(g) 3 Young & J. 273.

(h) This was so in *French v. Pellew*, 1 M. & S. 302.

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fore it was required in this case that Mr. Gaynor's signature should be verified.

The other judges concurred.

Rule absolute.

Nov. 11th.

REEVES v. WARD, Executrix of DANIEL WARD, deceased.

1. An executrix pleaded in assumpsit that she had not, nor at the commencement of the action or since, had any goods which were of the testator at the time of his decease in her hands to be administered; and the plaintiff replied, that the defendant, before and at the time of the commencement of the action and since, had divers goods of the testator to be administered; upon which issue was joined. At the trial the plaintiff having shewn that the defendant received certain assets, the defendant proved payment to a greater amount, and a verdict was found in her favour:—*Held, First*, that evidence of the payments was properly received; and *Secondly*, that the plaintiff was not entitled to judgment *non obstante veredicto*, upon the ground that the introductory part of the plea did not state that the executrix had fully administered the testator's goods. Whether such an omission is ground of special demurrer, *Qu.*

2. Where the deceased was a small tradesman, 10*l.* was held to be a reasonable allowance to the executrix for funeral expenses, as against a creditor.

(a) 2 Wms. Saund. 220 (a).

ASSUMPSIT on two promissory notes made by the testator in his lifetime.

Plea, That the defendant has not, nor at the time of the commencement of this action, nor at any time since, had any goods or chattels which were of the said *Daniel Ward* at the time of his decease, in her hands as executrix as aforesaid to be administered, and this she is ready to verify.

Replication, That the defendant before and at the time of the commencement of this action, and since, had divers goods and chattels which were of the said *Daniel Ward* at the time of his decease, in the hands of the defendant, as executrix as aforesaid to be administered, of great value, to wit, of the value of the damages sustained by the plaintiff by reason of the premises in the said declaration mentioned, wherewith the defendant, as executrix as aforesaid, could and might and ought to have satisfied their damages, and this the plaintiffs pray may be inquired of by the country, &c. Issue thereon.

At the trial before *Vaughan, J.* at the *London* Sittings, in last *Easter Term*, the plaintiff called an auctioneer, who proved that the defendant had received assets to the amount of 31*l.* 3*s.*; and the defendant then proved three several payments which she had made, *viz.* 10*l.* for probate, 10*l.* funeral expenses, and 14*l.* to one *Archer*, for money lent to the testator. The learned judge stated to the jury that he considered that the funeral could not be conducted at a less sum than 10*l.*, and that the probate duty ought also to be allowed:—and that if they believed that the payments made by the defendant exceeded the amount of the assets proved to have been received, the defendant was entitled to the verdict. Verdict for the defendant.

Atcherley, Serjt., moved for leave to enter judgment for the plaintiff *non obstante veredicto*, on the ground that the plea was a nullity, and also objected that evidence of payments could not be received under such a plea; he also applied for a new trial on the ground of surprise and misdirection. A rule *nisi* having been granted,

Bere shewed cause.—The plea is in the usual form, except that it omits the introductory words “that the defendant hath fully administered the goods which were of the deceased at the time of his death;” but in a note to *Noell v. Nelson (a)*, Mr. Serjt. *Williams* remarks “that these words seem to be superfluous, and that the more formal and correct way of pleading appears to be that they have no goods or chattels, &c., omitting the preceding words, that they had fully administered.” The plaintiff in his replication has

traversed the substance of the plea, viz. that at the time of the commencement of the action, and since, the defendant had goods to be administered. This plea might be supported upon a demurrer; but this is an application after a verdict for the defendant, to enter judgment *non obstante veredicto*, and that is only granted in a very clear case, and the rule was not moved for a replender. In *Newton v. Richards* (b), a plea in all respects similar to the present was held to be good on general demurrer. It is said that the evidence of the payments was improperly received, but the rule is laid down in *Williams, on Executors* (c), as follows: "It is held to be optional in the executor or administrator, either to plead a *retainer*, or to give it in evidence under a plea of *plene administravit*; so he may either plead or shew in evidence under that plea that he retains assets to a certain amount, for the expenses of the funeral, or of taking out administration, or to reimburse himself for payments made out of his own pocket in discharge of debts not inferior in their kind to the debt of the plaintiff, and before the commencement of the suit;" and again, it is said (d), "if upon the issue of *plene administravit*, it shall appear that the executor or administrator has been guilty of a *devastavit*, which has caused a failure of assets, the jury must find that the defendant has assets to that amount, and not find a *devastavit*." As to the expenses of the funeral, it was left to the jury to say whether the sum was reasonable; and in *Hancock v. Podmore* (e), 20l. was allowed as a reasonable sum.

Atcherley, Serjt., contrd.—The objection taken to the plea can clearly be sustained. It is laid down in the books that there are three grounds upon which an executor may defend an action. First, he may deny his character of executor; or, secondly, he may deny that he ever had any goods to be administered; or, thirdly, he may admit that he has had goods, but that he has administered them. The defendant in this case has not availed herself of either of these defences. The introductory words which have been referred to, explain what the subsequent part of the plea means, and they ought not to have been omitted. In the notes appended to the last edition of *Wms. Saund.* (f), the learned editors make the following remark upon the note by Mr. Serjt. *Williams*: "It seems rather too broadly asserted that the more correct way of pleading is to omit the words 'that they have fully administered;'" and again, "in the ordinary case they seem at any rate not to be incorrect, besides, the old precedents will all be found to contain them." If no goods or chattels had come to the hands of the executrix, then the plea, as it stands, would be good enough.—[*Tindal, C. J.*—The plaintiff could not be much in the dark, because an inventory of the effects would be found in the Spiritual Court.]—All the authorities are against the plea, and if it is held good in point of law, evidence of payments ought not to have been received under the issue which was raised. The plea can only be sustained on the ground that its meaning is that the defendant never had any goods to administer. Another objection is, that the amount allowed for the funeral expenses was unreasonable. In *Buller's Nisi Prius* (g), it is said, "In strictness no funeral expenses are allowed against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers' fees, but not for

(b) 4 Mod. 296.

(c) Vol. 2, p. 1206.

(d) Vol. 2, p. 1211.

(e) 1 B. & Ado. 280.

(f) Vol. 2, p. 220, a [a].

(g) Page 143.

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the pall, or ornaments. The usual method is to allow 5*l*.”—[*Tindal*, C. J.—There is no particular sum limited by the authorities. You should have addressed the jury upon that point, and it was left to the jury to say whether that was a reasonable sum, and they found that it was (*h*).]—Again, the probate was not taken out until after the action was brought, and that sum ought not to have been allowed.—[*Tindal*, C. J.—That was necessary to clothe the defendant with her authority as executrix.]

TINDAL, C. J.—This case comes before us upon three points:—First, that judgment may be entered for the plaintiff *non obstante veredicto*; secondly, upon the ground that improper evidence was admitted at the trial; and thirdly, on the ground of surprise and misdirection, and I am of opinion that the rule ought to be discharged. The first objection is that the defendant being sued as executrix, has not pleaded in the common and ordinary form, inasmuch as the usual introductory allegation is omitted in the plea; but it appears to me that the answer to the plaintiff’s application is, that he has joined issue upon the plea as it stood upon the record. Whether or not such an objection could be sustained upon special demurrer it is not necessary to decide; but this case does not come before us upon a special demurrer, but after a verdict found by the jury, on an issue which has been raised on the substantial part of the plea. The ground of granting a judgment for the plaintiff *non obstante veredicto* is, that the defendant has put such an answer to the action upon the record, that it cannot in justice or in substance entitle him to retain the verdict; but it would be strange to say that when the plaintiff has replied to the plea, as it is pleaded, and after a verdict found against him upon the issue raised, he might afterwards claim to have the judgment entered *non obstante veredicto*; there is therefore no ground whatever for the first part of this motion. The second objection is almost answered by the observations which have been already made as to the form of the plea: the plaintiff goes to trial upon the issue raised, and it is every day’s practice to receive evidence of payments made by an executor after proof is given of assets having come to his hands. How then can the plaintiff say, that the omission of the introductory words in the plea was the cause of surprise, at the trial? for the meaning of the plea is that the defendant had not at the commencement of the suit, or since that time, any goods or chattels to be administered. As to the third ground upon which this rule was moved, the case falls within the general rule, that where the matter in dispute is less than 20*l*. the Court will not interfere.

PARK, J.—I will merely state my entire concurrence with my Lord Chief Justice on all the points which have been raised. As to the form of the plea, the question is not whether there was not ground for a special demurrer, but it arises upon the issue which the plaintiff raised by the replication. The notes of the late Mr. Serjt. *Williams*, one of which has been referred to in the argument, are now of the highest authority, and that very learned person says, that the introductory words are superfluous; but on the other hand, the late learned editors of *Saunders’s Reports* say it is better to insert those words: but the case has been very properly put in another way, for an authority

(*h*) The testator was a small tradesman (a painter), residing in *Wiltshire*.

has been cited to shew that if the defendant has been guilty of a *devastavit*, it may be given in evidence under the plea of *plene administravit*.

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GASELEE, J.—The plea is not framed according to the old form, but whether it is wise to deviate from it is not the question before the Court. A difficulty occurred to me, as to whether such a plea as that on the record might not have prevented a replication of a *devastavit*, but that has been removed by the passage which has been cited to shew that evidence of a *devastavit* may be given under a plea of *plene administravit*. On the other points I entirely concur with the rest of the Court (i).

Rule discharged.

(i) Mr. J. Bosanquet was sitting as one of the Lords Commissioners of the Great Seal.

ENGLER, Administrator, &c., v. TWYSDEN.

Nov. 14th.

SIR W. Follett obtained a rule *nisi*, calling upon the defendant to shew cause why the plaintiff should not be relieved from the payment of the defendant's costs, under Stat. 3 & 4 W. 4, c. 42, s. 31 (a). The action was brought on a bond given by the defendant to the intestate in 1813 (b), and the defendant pleaded the Statute of Limitations, and his discharge under the Insolvent Debtors' Act. At the trial, before Gaselee, J., a book which was kept by one of the officers of the Insolvent Court was produced in evidence, whereby it appeared that on the 17th December, 1818, the defendant had been duly discharged under the provisions of the Insolvent Act, and his counsel, who had supported his petition, corroborated this fact (c). Verdict for the defendant upon the issue raised on the second plea. By the affidavits it appeared that the bond was found by the plaintiff amongst the papers of the testator, and with it a notice, dated in 1818, that the defendant intended to apply for his discharge under the Insolvent Debtors' Act; that the plaintiff had caused a search to be made amongst the records of the Insolvent Court, before he commenced the action, but that no entry of the discharge of the defendant appeared in any of the books which were produced, but that opposite to the schedule of debts, which had been filed by the defendant, the letter D. was written in pencil. The officer of the Insolvent Court stated in his affidavit, that if any person had searched the office carefully it might have been ascertained that the defendant was remanded on his first petition, but that upon a re-hearing he was discharged in 1818.

An administrator arrested the defendant on a bond given to the intestate more than 20 years before his death, and no interest had been paid upon it. The defendant pleaded his discharge under the Insolvent Act, and the verdict was found in his favour. It appeared that the plaintiff had knowledge that the defendant had applied for his discharge before the action was brought:—*Held*, that the administrator was not entitled to be relieved from the payment of costs to the defendant under 3 & 4 Wm. 4, c. 42, sec. 31.

Talfourd, Serjt., shewed cause.—The plaintiff was well aware that the defendant had applied for his discharge in 1818; and this action was brought with a mere hope that the defendant would be unable to prove his discharge. In *Southgate v. Crowley* (d), it is said that the general rule now

(a) Sec. 31 enacts, "that in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the said superior courts shall otherwise order, be liable to pay costs to the defendant."

(b) The defendant was arrested for the

debt, but by an order made by Mr. J. Vaughan, the bail-bond was cancelled.

(c) The learned judge directed the jury that sufficient evidence had been given to prove the defendant's discharge, although it was objected for the plaintiff at the trial, that more formal proof was necessary.

(d) *Ante*, l; 1 Bing. N. C. 518, S. C.

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is that executors shall pay costs like other plaintiffs, and that there must be some misconduct shewn on the part of the defendant to entitle the plaintiff to be relieved: now no misconduct is imputed to the defendant in this case, but negligence on the part of the plaintiff clearly appears, for he could have ascertained that the defendant was discharged, if he had made more minute inquiries. In *Godson v. Freeman* (e), the Court of *Exchequer*, during the present term, coincided with the decision in *Southgate v. Crowley*.

Sir Wm. Follett, *contra*.—The present case differs from those which have been cited in one important fact, namely, that it is admitted that the money secured by the bond, has never been paid to the plaintiff or to the intestate. The issue on the plea of the Statute of Limitations, was found for the plaintiff. The plaintiff searched the records at the Insolvent Debtors' Court, but he could find no trace of the discharge of the defendant; the proof of the discharge came from the custody of persons over whom the plaintiff had no control. Therefore the plaintiff exercised reasonable care and diligence before he commenced the action. By the operation of the new Statute, the Court must look at the facts and circumstances of each particular case, and say if it was reasonable that the action should be brought by the executors or administrators; if it was, then a duty to enforce the claim is cast upon them, and they must proceed. In *Southgate v. Crowley* (f), the debt for which the defendant was sued was found not to be due; and there were no entries of the sums which the plaintiffs claimed, in the testator's books of account, but they chose of their own pleasure to make an unreasonable demand; and in that case it is said, that if the defendant kept a receipt in his pocket, and allowed the plaintiff to proceed, it would be such misconduct as would induce the Court to interfere; and here the defendant ought to have shewn his discharge to the plaintiff. Taking the principle advanced in *Lysons v. Barrow* (g) as the rule by which the Court is guided, this case is clearly within it; the administrator was bound to collect the debts of the testator, and he acted *bonâ fide*, and make every proper inquiry before he proceeded with this action; and having satisfied himself that the debt was due, he was bound to take proceedings.

TINDAL, C. J.—I see nothing in this case which calls upon the Court to exercise its discretion in favour of the plaintiff. The effect of the Act of Parliament is to put an executor or administrator upon a footing with other plaintiffs, but in certain cases they may apply to the discretion of the Court for relief. The rule which is laid down in *Lysons v. Barrow* (h), states the law more favourably for executors and administrators than I am disposed to agree to. There is no evidence of carelessness or misrepresentation on the part of the defendant in this case, but it does appear that the plaintiff has not used a proper degree of care and caution in bringing the action; for, in the first place the bond was more than twenty years old, and no interest appeared to have been paid, which fact alone must have raised a suspicion in the mind of the plaintiff. It appears also that the plaintiff had reason to suppose that the defendant had been discharged under the Insolvent Act, for with the bond was found a notice given to the obligee, stating that the defendant

(e) Not yet reported.

(f) *Ante*, 1; 1 Bing. N. C. 518, S. C.

(g) 10 Bing. 566.

(h) 10 Bing. 563.

intended to apply to the Court for relief. A schedule was also produced at the Court, and in the column where the discharge of the defendant is inserted the letter D. was marked in pencil. Under these circumstances a prudent person would have made further inquiry to ascertain whether the defendant had not been discharged, and this want of proper care and caution which has been manifested, justifies us in saying that we ought not to make this rule absolute.

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PARK, J.—The question is whether there are such circumstances in this case as justify the Court in interfering in favour of the plaintiff. The circumstances which have been mentioned are certainly very strong to shew that due diligence was not used by the plaintiff, and that he had not colourable grounds for arresting the defendant. A prudent and sensible person would have done more than have made a search at the Insolvent Court; he would have ascertained who were the defendant's attorneys when he applied for his discharge, for he knew that he had been in prison and had applied to be discharged. I therefore think we are not warranted in ordering the plaintiff to be relieved from the payment of the defendant's costs. I do not mean to deny but that there may be two or three stronger expressions used in *Lysons v. Barrow* (i) than the facts of that case warranted; some of them may certainly be too strong, but each case must vary in its circumstances. *Southgate v. Crowley* (j) is certainly a very strong case in favour of the executors, and yet the Court held that they did not see any circumstances to warrant them in relieving them; but in the present case the plaintiff acted most unwarrantably in arresting the defendant. Under the circumstances of the case I agree that the rule should be discharged.

GASELER, J.—Had I been aware that this case would have come on for argument to-day, I would have brought my notes into Court; but my recollection is that the officer informed the party who made the search at the Insolvent Debtors' Court, that the letter D., written in pencil, meant that the defendant was discharged; if this was so the plaintiff had no ground whatever to proceed with the action. As to *Lysons v. Barrow* (i), the party failed on another ground.

Rule discharged.

(i) 10 Bing. 563.

(j) *Ante*, 1; 1 Bing. N. C. 518, S. C.

LINLEY v. BONSOR.

Nov. 11th

ASSUMPSIT for goods sold and delivered, with the money counts. *Pleas*:
First, That the defendant did not promise in manner and form alleged;
Secondly, The Statute of Limitations, "that the cause of action did not accrue within six years next before the commencement of the suit." Issue was joined on both pleas.

At the trial before Parke, B., at the Yorkshire Spring Assizes, 1835, it was in evidence that the plaintiff and defendant were both traders, and that

trustee appointed under a deed of assignment for the benefit of the creditors of A., paid a sum of money to a creditor in part payment of his debt, which payment A. had not authorized him to make, except in satisfaction of the demand:—*Held*, that this was not such a part payment as would take the case out of the Statute of Limitations.

1. To take a case out of the Statute of Limitations, the acknowledgment of a debt must contain an express or implied promise to pay.
 2. Where a

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between *November*, 1827, and *June*, 1828, the plaintiff had supplied the defendant with goods to the amount of 114*l*.

In *September*, 1828, the defendant being unable to pay his creditors in full, he made an assignment of his estate and effects for their general benefit, to one *Fox* and another trustee; and the defendant wrote to the plaintiff, and requested him to execute the deed of assignment; but the plaintiff positively refused to assent to this request.

The defendant afterwards wrote the following letters to the plaintiff, at the time of their respective dates.

“ *London*, 4th *Feb.* 1830.

“SIR—Some time ago I was informed by Mr. *Fox*, that my affairs could not be settled owing to Mr. *Linley* not signing the deed. As they still remain unsettled, I suppose the same cause still exists. You have, no doubt, your reasons for thus standing out; however, I am convinced that your interest cannot be promoted for so doing; for I believe the trustees have done all in their power for the good of the estate. I am, I assure you, truly sorry for your case; still there is one other a much harder than yours. I am naturally anxious that they should be settled, not that I should be affected particularly by whatever steps might be taken, but that my creditors would be advantaged by their being settled as soon as possible. I know it would be against the general good to make me a bankrupt, and was it not that I wish the best done for my creditors, I should be glad of that step being taken; for I should be released from an affair that I doubt will be a great trouble to me. Do comply, and for once put the thing at rest; a thing desirable to all parties

(Signed) “ *T. B.*”

“ *London*, 11th *Feb.* 1831.

“SIR—You know I gave up all my affairs, and therefore I consider I have nothing to do with the claim you trouble me with, nor shall I; you know also whom they are who have the arrangement of my affairs. I wish you would do me the favour to make me a bankrupt. This is in your power, and by so doing you would confer a great favour on, &c.

(Signed) “ *T. B.*”

In *September*, 1831, *Fox* saw the plaintiff, and requested him to receive a payment of *five shillings* in the pound in satisfaction of his debt, but the plaintiff refused to consent, or to sign the deed of assignment. *Fox*, thereupon, without having any authority from the defendant to make such payment merely *on account* of the debt, paid the plaintiff 28*l*. 11*s.* 5*d.*, for which the following receipt was given :—

“ *Birmingham*, 24th *Sept.* 1831.

“Received of Mr. *Fox*, 28*l*. 11*s.* 5*d.*, on account of the estate of *Thomas Bonsor*, say in part of my debt.” *Fox* stated in his evidence that the defendant afterwards complained that such a payment had been made.

On the 7th of *October*, 1834, the defendant wrote to the plaintiff as follows :—

"I much regret the inconvenience you have caused me. You have promised others and myself, that you would never trouble me. You know I gave up every thing in *Paradise-street*; and you have had the same as the rest, and what would you have more? Why should I, even if it was now in my power, pay you in preference to those who have been so liberal as to execute the deed, and express themselves satisfied that I had done all that an honest man could, and now my principal creditors are my sureties? I ask you again, would I be so ungrateful and unjust to them? Would I not lie in prison for ever first? Yes! I shall rely upon my own integrity, &c.

(Signed) "Thomas Bonsor."

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This action having been commenced by the plaintiff on the 27th of *February*, 1835, to recover the balance of his account, the question made at the trial was, whether there had been any promise or payment by the defendant sufficient to take the case out of the operation of the Statute of Limitations (a).

The learned judge thought he ought to nonsuit the plaintiff, but afterwards directed the jury that the letters written by the defendant did not amount to a sufficient acknowledgment, as they contained no express or implied promise to pay the debt; and that the part payment by *Fox*, being made without the authority of the defendant, was therefore insufficient.

Verdict for the defendant.

In *Easter Term*, a rule *nisi* for a new trial was applied for, on the ground of misdirection, and because the verdict was against evidence.—The rule was refused on the first ground, and granted on the second.

R. Alexander and Hoggins shewed cause.—*First*, The payment made by *Fox* was not such a payment as would take the case out of the Statute of Limitations: it was made without the authority and against the consent of the defendant. *Secondly*, Neither of the letters which were in evidence at the trial are sufficient, because, as was said by the learned judge, they do not contain any express or implied promise to pay the debt. The letter of the 4th of *February* does not contain the slightest evidence of a promise to pay. The second letter disclaims the debt altogether; and the defendant says "he has nothing to do with the claim." It is now established that there must be a promise to pay, express or implied, as well as an acknowledgment of the debt, to take a case out of the Statute of Limitations. Thus in *Fearn v. Lewis* (b), which was an action on a bill of exchange; two letters were relied on to take the case out of the Statute. The first stated the defendant would feel obliged by his correspondent's offer of assistance to settle with Mr. *F.* (the plaintiff), and in the present state of his affairs, he could only say he should feel much indebted to Mr. *F.* to withdraw his outlawry; and that Mr. *F.*'s claims should receive that attention, which, as an honourable man, he considered them to deserve. In the second letter the defendant stated that he was ready to do any thing to satisfy Mr. *F.* and all his creditors. There was no evidence that the defendant had been outlawed in the action; and the Court held that this was not a sufficient acknowledgment; and *Tindal*, C. J., said, "The question is, whether these letters constitute a distinct and unqualified acknowledgment of an existing debt.

(a) Stat. 9 Geo. 4, c. 14.

(b) 6 Bing. 349.

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Now the first letter points to a debt on which the defendant had been proceeded against to outlawry, and though this record might not of necessity shew whether the defendant had been outlawed or not, yet unless the plaintiff proved that circumstance, his claim would not appear to be one to which the acknowledgment in the letter could apply; but neither of the letters import such a direct and unqualified acknowledgment of a debt as would authorize the Court in implying a promise to pay. They import no more than an offer on the part of the defendant to surrender his income with a view to an arrangement with his creditors, provided he should be allowed time to arrange his affairs." In *Kennet v. Milbank* (c), *Bosanquet, J.* says, "An acknowledgment however can only operate as evidence of a promise; and if it be accompanied with qualifications which shew it was not meant to operate as a promise, it will not be sufficient to take a debt out of the operation of the Statute of Limitations." So here the whole of the correspondence must be taken together, and that clearly shews that it was not the defendant's intention to pay the debt in full. All the cases upon the subject are collected in the judgment of Lord *Tenterden, C. J.*, in *Tanner v. Smart* (d), and his lordship there says, "Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but when the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why should not the rule '*expressum facit cessare tacitum*,' apply?"

Wightman and Heuton, in support of the rule.—The question is whether the acknowledgment that the debt was due is not unequivocal and unfettered; if it is, the law will imply a promise to pay, and the case is taken out of the Statute of Limitations. The late Statute (e) has been held not to make any alteration in the form of the acknowledgment, but only in the proof of it (f). This case may therefore be argued with reference to the old authorities. It is true that no precise amount of the debt is stated in the defendant's letters; but if the acknowledgment is unequivocal, the plaintiff may shew the amount of the debt, as was said by *Bayley, B.*, in *Lechmere v. Fletcher* (g), "Suppose a debt exists of a considerable standing, and suppose the defendant to write—'I do not know the amount, as we have had no settlement; nothing however has been paid, but if you will ascertain what the amount is, I will pay you.' I think there is nothing in the Statute to prevent evidence being given to prove such amount; and that if there be such proof, the plaintiff may recover the whole amount, and is not confined to nominal damages." And even if it were necessary to shew an admission, in writing, of the amount of the debt, the defendant has admitted in the letter of the 11th of *February*, that it was upwards of 100*l.*, for he says, "I wish you would do me the favour to make me a bankrupt; this is in your power." In *Dabbs v. Humfrey* (h), the letter relied on by the plaintiff, contained only an acknowledgment of the debt, and that was held sufficient. The presumption of law is, that the debt has been discharged,

(c) 8 Bing. 42.

(d) 6 B. & Cres. 603.

(e) 9 Geo. 4, c. 14.

(f) *Vide Haydon v. Williams*, 7 Bing.

(g) 1 Cr. & Meeson, 632.

(h) 10 Bing. 446.

and the subsequent acknowledgment of it revives the old debt. *Thornton v. Wellingworth* (h), *Perham v. Raynal* (i). In *Fearn v. Lewis* (j), the acknowledgment was made to a third person. In *Kennet v. Milbank* (k), the acknowledgment was contained in a deed which had become void, by the non-performance of a condition: and in *Tanner v. Smart* (l), Lord Tenterden said, "It is only in actions of assumpsit that an acknowledgment has been held an answer; and when in the case of *Hurst v. Parker* (m), it was decided to be inapplicable to actions of trespass, Lord Ellenborough gave what appears to be the true reason; that in assumpsit, 'an acknowledgment of the debt is evidence of a fresh promise; and that promise is considered as one of the promises laid in the declaration, and one of the causes of action which the declaration states.'"

Secondly, The payment made by *Fox*, was accepted in part discharge of the debt; and the defendant in his letter of the 7th of *October*, plainly acknowledges *Fox's* authority; he says, "you have had the same as the rest, and what would you have more?" and this part payment, by an authorized agent of the defendant, is sufficient to take the case out of the Statute.

TINDAL, C. J.—The only question in this case is, whether there was either "an acknowledgment or promise" within the meaning of the Stat. 9 G. 4, c. 14, s. 1. Now there is no difficulty in understanding what a promise is; nor can there be any doubt that in the present case no promise to pay the debt was made. The intention of the writer of these letters was evidently not to pay the demand, except in one of two ways; 1st, under a fiat in bankruptcy; or 2dly, by compelling the plaintiff to come into the arrangement which was made by the deed of assignment for the general benefit of the creditors. Many cases have been cited; but since the case of *Tanner v. Smart* (l), I can see no ground for supporting many of the older decisions; and I think when the question for the jury was, whether there was any acknowledgment or promise in writing to pay the debt, the judge was fully warranted in telling the jury, that the letters in question did not contain any such promise or acknowledgment. Nor is it necessary to go into the consideration of some of the cases which have been cited during the argument. Secondly, as to the alleged part payment, the Statute requires a payment to be made by the party, or by some person under his authority; but it does not extend to a payment made by a mere stranger; if it did, it would be easy in every case to deprive a defendant of the benefit of the Statute. Here the defendant having entered into a composition with all his creditors, except the plaintiff, employed *Fox* to tender him the same dividend as the other creditors had received, in satisfaction of the whole of his demand; but if *Fox* chose to make the payment merely on account, he was not justified in doing so, but he acted as a stranger; and it appears by the evidence that the defendant complained of what *Fox* had done. I am therefore of opinion that there has not been any part payment to take the case out of the operation of the Statute. This rule must therefore be discharged.

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(h) 2 B. & Cres. 824.

(i) 2 Bing. 306.

(j) 6 Bing. 349.

(k) 8 Bing. 42.

(l) 6 B. & Cres. 603.

(m) 1 B. & A. 92

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GASELEE, J.—I agree that this rule must be discharged. There is scarcely any admission which has not, in former times, been held sufficient to take a case out of the Statute of Limitations; in one case, it was said to be sufficient, where a defendant said he would not pay a debt (*); but the tide of authority is now turned, and the Courts require something more. The words used in the Statute are, "acknowledgment or promise;" and it means such an acknowledgment of the debt as would lead the judgment to infer that the party meant a promise to pay the debt. These letters contain nothing like a promise to pay; the defendant's admission is more like the case of the party who said he would not pay. As to the part payment, that was made against the consent of the defendant, and without his authority, and is therefore insufficient.

Rule discharged (o).

(n) *Dowthwaite v. Tibbutt*, 5 M. & S. 75.

(o) Mr. J. Bosanquet was sitting as one

of the Lords Commissioners of the Great Seal, and Mr. J. Park went to chambers during the argument.

Nov. 20th.

MUNK v. CLARKE.

The plaintiff having been made a bankrupt, applied to a commissioner in bankruptcy to have an official assignee appointed, in order that his estate might not be wasted, and also to enable him to contest the validity of the commission. The defendant was accordingly appointed official assignee, but he had no knowledge of the plaintiff's application. It proved that the petitioning creditor's debt was invalid, and it was held, that the plaintiff was not estopped from suing the defendant for money received by him in his character of official assignee, and that no previous demand of the money need be made.

ASSUMPSIT for money had and received. The cause was tried before Tindal, C. J., when the following facts were stated for the opinion of the Court in a special verdict (a).—On the 28th July, 1824, a commission of bankruptcy issued against the plaintiff, on the petition of *John Foster*, under which the plaintiff was declared a bankrupt by the commissioners named in the commission, and the said *J. Foster* was chosen sole assignee. The estate and effects of the plaintiff were assigned to *J. Foster* by the said commissioners; but at the time of the issuing the commission the plaintiff was not indebted to *J. Foster* in the sum of 100*l*. After the issuing the commission the plaintiff disputed the validity thereof, on the ground of the alleged insufficiency of the petitioning creditor's debt. On the 23d of January, 1831, the plaintiff applied to *C. F. Williams*, Esq., one of the Commissioners of the Court of Bankruptcy, to appoint an official assignee to the said commission, as well for the purpose of investigating the petitioning creditor's debt, as for the purpose of taking care of the property of the estate. And the said commissioner, on such application of the plaintiff, appointed the defendant an official assignee of the estate and effects of the plaintiff, under the commission, for the purposes aforesaid; but the defendant never received any notice that the plaintiff disputed the commission, or that he, the defendant, was appointed for any special purpose. The defendant received from a tenant of certain premises belonging to the plaintiff the sum of 18*l*. 5*s*. 9*d*., due for rent thereof, and retained the same in his own hands at the commencement of this action.

(a) This case came before the Court on a former occasion (see *Munk v. Clarke*, 10 Bing. 103); and it being there admitted that there was no valid debt to support the commission, two questions were raised. *First*, Whether the defendant was liable to be sued, as he had received the money in his character of official assignee; and *Secondly*, Whether the plaintiff had precluded

himself from maintaining the action by the application which he made to the commissioner of bankrupts. The Court held, on the first point, that the defendant was in the same situation as an ordinary assignee, and was liable to be sued; but upon the second question, they directed a new trial, that the facts of the case might be more accurately stated.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover the said sum of 18*l.* 5*s.* 9*d.* which had not been demanded before the action was brought.

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Wilde, Serjt., for the plaintiff.—The defendant is in the situation of a stakeholder, and this money being the property of the plaintiff he is the party entitled to recover it, *Kerr v. Osborne* (b). *Heane v. Rogers* (c) is a much stronger case than the present, for there the plaintiff had consulted his assignees as to the best means of disposing of his property, and he also acknowledged himself to be a bankrupt by offering to surrender a lease, and yet the Court held that he was not thereby estopped from disputing the validity of the commission. In that case all the authorities upon the subject of estoppel were reviewed. Neither public policy or private justice requires that a bankrupt should be precluded from disputing the validity of a fiat, because he has submitted to the authority of the commissioner. Here the defendant did not apply to pay the money into Court, as he might have done, but he chose to contest the plaintiff's right to recover, by setting up a title in himself. It appears upon the special verdict that the plaintiff applied to have an assignee appointed, that he might be enabled to contest the validity of the commission. Some expressions in the judgment of *Munk v. Clarke* (d) will be relied on for the defendant, but the facts are very different, and the attention of the Court was not expressly drawn to the question of estoppel. No demand of the money was necessary to entitle the plaintiff to recover in this action, for the defendant has set up a title in himself, and has contended that the plaintiff was a bankrupt, but it is proved that the commission was altogether a nullity, and that consequently the defendant had no right to retain the money which he had received.

Atcherley, Serjt., *contrâ*.—This case must be discussed upon the facts stated in the verdict. The question is not whether the plaintiff was legally made a bankrupt, but whether, after being the means of placing the defendant in the situation of assignee, he can subsequently turn round and sue him; and that too without giving any notice. It is not a question of estoppel, in the technical sense of the word. When the plaintiff had caused the defendant to be appointed official assignee, it became the defendant's duty to receive the money which is now sought to be recovered. He became the official assignee through the instrumentality of the plaintiff. When this case was brought before the Court, after the first trial, *Munk v. Clarke* (d), *Tindal*, C. J. remarked upon this point, "We can only say in general terms, that if the defendant should turn out to have been appointed to the office through the means, instrumentality, or procurement of the plaintiff, it will be very difficult to say he can have any right to maintain this action. It was the duty of the defendant, when appointed, to receive the money in question; he had no option under the Statute, and this was well known to the plaintiff at the time of his appointment." In *Like v. How* (e), Sir *James Mansfield*, C. J., held that a bankrupt could not turn round and sue his assignees.—[*Tindal*, C. J.—Because the bankrupt had gone round to his creditors and solicited them to vote for those assignees.]—So, here the plaintiff requested the com-

(b) 9 East, 378.

(c) 9 B. & Cres. 377.

(d) 10 Bing. 106.

(e) 6 Esp. 20.

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missioner to appoint an assignee.—[*Tindal*, C. J.—But the defendant was not aware of that fact: he was appointed in the ordinary manner. That is the difficulty in which you are entangled. In the case you cite, the conduct of the plaintiff must have induced the defendants to suppose that the bankrupt did not intend to dispute the commission.]—*Clarke v. Clarke* (f) was an action of trover brought by a bankrupt to dispute the validity of the commission, and Mr. Justice *Heath* said, "The bankrupt might submit to the commission, but he need not take any part in any thing done under it, nor shew his acquiescence under it. The action cannot be sustained, the plaintiff must be called." To the same effect are *Watson v. Hase* (g), and *Ex parte Leigh* (h).

Wilde, Serjt., in reply.—The appointment of the defendant as assignee was the act of the commissioner, and the special verdict finds that he was appointed for the very purpose of enabling the plaintiff to dispute the validity of the commission, and to prevent the estate from being wasted. The supposed acquiescence of the plaintiff is, therefore, a matter which cannot now be entertained. The question is, to whom does the money belong, which is now sought to be recovered? No person except the defendant claims it, and the verdict finds that the legal title is in the plaintiff. In *Ex parte Leigh* (h), the bankrupt had supported the commission; and *Watson v. Hase* (g) was supposed to follow *Goldie v. Gunston* (i). There was nothing in the conduct of the plaintiff which was calculated to surprise the defendant, for he gave notice to the commissioner that he intended to dispute the validity of the commission.

TINDAL, C. J.—This cause was sent down for trial a second time, because it was doubtful whether the plaintiff had not taken steps to procure the appointment of the defendant as assignee, and on that point the Court wished to be informed, because if it had appeared that the plaintiff had procured the appointment of the defendant, the case would be similar to *Like v. How* (j). But it appears to me that the circumstances of this case do not bring it within that authority. The plaintiff here was not instrumental to the appointment of the defendant, further than that he went to the commissioner and requested him to appoint an official assignee, as well to protect his property from being wasted, as to enable him to investigate the validity of the petitioning creditor's debt. It does not appear that there was any communication of the circumstances between the commissioner and the defendant, but the latter became assignee by the due course of law, and was in the same situation as an ordinary assignee. But it is contended that by the special verdict, it appears that there has been a sufficient acquiescence in the appointment on the part of the plaintiff, to prevent him from raising the present question. Now the first observation is, that in considering the special verdict we are not at liberty to draw any inferences; every fact should be stated one way or the other. But even if we were to draw an inference, I could not come to the conclusion which is contended for, inasmuch as it is stated that the plaintiff disputed the validity of the commission on the ground of the insufficiency of

(f) 6 Esp. 61.
(g) 2 B. & Cres. 153.
(h) 2 Glynn & J. 332.

(i) 4 Camp. 381.
(j) 6 Esp. 20.

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the petitioning creditor's debt. And it seems to be an answer to this objection that the special verdict finds as a fact, that there was no sufficient petitioning creditor's debt; and putting the doctrine of estoppel as high as it can be placed, I have always understood that the Court must take notice of the truth which appears on the record. In *Co. Lit.* 352 (b), it is said, "Where the veritie is apparent in the same record, then the adverse party shall not be estopped to take advantage of the truth, for he cannot be estopped to allege the truth when the truth appeareth of record." The same doctrine is recognised in *Ludford v. Barber* (k). Then the next question is whether this is a case in which a previous demand was necessary. The defendant must be considered as if he was an ordinary assignee (l), and the question is whether such an action may not be brought against an assignee to recover money had and received, without making a previous demand. If the commission is void, the money, *ex vi legis*, becomes the money of the plaintiff: and under such circumstances I am not aware that a previous demand is necessary to entitle the plaintiff to recover. It is a common way to try the validity of a commission, by an action of trespass, and as that is an action in which no previous demand need be made, the plaintiff may surely waive the *tort* and bring his action for money had and received. I am therefore of opinion that no demand was necessary, and that our judgment must be for the plaintiff.

GASELEE, J.—As to the acquiescence of the plaintiff, this case differs from *Like v. How* (m), because there the bankrupt went about amongst his creditors requesting votes for the assignees, and in *Goldie v. Gunston* (n), the plaintiff had obtained his discharge out of custody on the ground of his being a bankrupt. But there is nothing in this case to shew acquiescence on the part of the plaintiff. As to the necessity of a demand, it is clear upon the facts stated that if a demand had been made, it would not have been acceded to, and even if it were necessary, it would have been waived by the defendant setting up a title in himself. It is said that this is a hard case against the defendant, and Lord *Hardwicke* has said, that assignees ought to be protected, and no doubt the Court of *Chancery* will, in some cases, interfere by injunction. But why did not the defendant apply to that Court? probably the reason was that he could not go with clean hands, and therefore he was well aware the Court would not assist him.

BOSANQUET, J.—I am of opinion that the plaintiff is entitled to our judgment. Two points arise in the case. The first, Whether an official assignee, appointed in the usual course, is in the same situation as an ordinary assignee; and the second, whether there are any particular circumstances in this case to prevent the plaintiff from succeeding in his action. The first question has been determined by this Court in the affirmative, in *Munk v. Clarke* (o). As to the second question, it is contended for the defendant, that the plaintiff has acquiesced in the appointment of the defendant as assignee, but I think the acquiescence ought to be laid out of the question, for the verdict finds as a fact that there was no valid petitioning creditor's debt; we are therefore not at liberty to enter into a consideration of the circum-

(k) 1 T. R. 86.

(n) 4 Camp. N. P. C. 39

(l) *Munk v. Clarke*, 10 Bing. 109

(o) 10 Bing. 106.

(m) 6 Esp. 20.

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stances to ascertain if there was an acquiescence, but independently of that, if we were at liberty to make the inquiry, I do not see any thing to warrant any such inference, for as long ago as 1824, the plaintiff disputed the validity of the commission; and in 1831, it appears that he applied to one of the commissioners to appoint an official assignee to the commission; and for what purpose? For the purpose of inquiring into the validity of the petitioning creditor's debt, and also to take care of the property, in order that the estate might not suffer whilst he was disputing the commission. There was therefore no evidence which could induce a jury to say that the plaintiff had acquiesced in the commission: nor do I think the plaintiff is prevented from recovering the money which has been received by the defendant as official assignee, for it is still remaining in his hands. This case differs from *Lik v. How* (p), for here the defendant merely desired the commissioner to execute his authority and to appoint an assignee, and having done so, it appears that no communication of the circumstances of the case was made to the defendant, who was therefore appointed official assignee by the commissioner in the ordinary course, and he accepted the appointment, subject to the liabilities of an official assignee, which are the same as those of ordinary assignees. The only remaining point is, that no notice appears to have been given requiring the defendant to pay over the money to the plaintiff; but if the defendant is in the same situation as an ordinary assignee, and as the money is the plaintiff's property, and it remained in the defendant's hands. I do not think any demand was necessary. If we were at liberty to draw an inference from the facts stated, there could have been no doubt, because the defendant claimed a title to hold the money.

Judgment for the plaintiff (q).

(p) 6 Esp. 20.

(q) Mr. J. Park was absent at chambers.

Nov. 3d.

M'DONNELL v. BROOKE.

In an action for maliciously, and without probable cause, causing the plaintiff to be charged with a felony: it appeared that the defendant charged the plaintiff, his servant, with stealing a trunk and other articles on quitting his service; the judge left the question of reasonable and probable cause to the jury:—*Held*, that this was no misdirection, because in some cases the reasonable and probable cause, as well as the question of malice, may be left to the jury.

THIS was an action brought against the defendant for maliciously and without probable cause, causing the plaintiff to be taken into custody on a charge of felony. At the trial before *Denman*, C. J., at the last *Gloucester Assizes* it was in evidence that the plaintiff had been a servant to the defendant, and that being discharged from his service she quitted his house, and at that time took away a trunk and a cloak belonging to him. The defendant, having been informed of this circumstance, wrote a letter to the plaintiff and requested her to return the articles she had taken away; and intimated, if they were not returned by the next *Saturday*, that on the following *Monday* criminal proceedings would be instituted against her. The plaintiff being absent from home, did not receive this letter; but on *Saturday* the defendant obtained a warrant and caused her to be taken into custody: she was kept in the custody of the constable until *Monday*, when no further proceedings being taken, she was discharged. The learned judge left it to the jury to say, first, whether the defendant had reasonable and probable cause to institute the proceedings: and, secondly, whether he acted maliciously. The jury found a verdict for the plaintiff, damages 50*l*.

Platt moved for a new trial on the ground of misdirection. The first question was for the judge and not for the jury, *Blachford v. Dod* (a), where probable cause was decided as a question of law by the judge. *Williams v. Taylor* (b), *Davis v. Hardy* (c), are to the same effect.

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TINDAL, C. J.—This comes within that class of cases where the reasonable and probable cause depends upon a chain of circumstances, such as from whence the trunk was taken, to what place it was taken, and under what particular circumstances, all of which form the substratum of the case. This was not a dry question of law, and I am not disposed to disturb the verdict.

PARK, J. concurred.

GASELEE, J.—In cases similar to the present I have often taken the opinion of the jury.

BOSANQUET, J.—Considering the nature of the facts the question was properly left to the jury.

Rule refused (d).

(a) 2 B. & Ado. 179.
(b) 6 Bing. 183.
(c) 6 B. & Cres. 225.

(d) See *Ravenga v. McIntosh*, 2 B. & C. 693; *Nicholson v. Coghill*, 4 B. & C. 21.

HOOKEN v. TOOKE.

Nov. 26th.

TREMENERE applied for a *distringas* to compel an appearance to a writ of summons. No copy of the writ had been left at the supposed residence of the defendant, because the parties who answered the inquiries had stated that the defendant had never lodged with them, and that they knew nothing about him.

To obtain a *distringas* the copy of the writ of summons must be left at the defendant's supposed address, although the parties residing at the house, state that they have no knowledge of him.

Per Curiam.—A copy of the writ of summons must be left in the usual manner.

Distringas refused.

DOE d. BAWDEN and an' v. ROE.

Nov. 26th.

MELLOR applied for a rule requiring the lessors of the plaintiff to give security for costs, upon an affidavit which shewed that one of them, who claimed as landlord of the premises, had been abroad for fourteen years, and that the other was in this country, but was believed to be in bad circumstances and without any claim in his own right.

Where one of two lessors of the plaintiff is abroad, the defendant is not entitled to security for his costs.

Per Curiam.—The defendant has the person of the lessor of the plaintiff, who is not abroad, as a security.

Rule refused.

Com. Pleas.

Nov. 26th.

The affidavit of debt was for money lent generally, and the indorsement on the *capias* stated the debt to be due on a promissory note: *Held*, not to be a variance.

PATTERSON v. HABBERSHAN.

THE defendant was arrested on an affidavit made by the plaintiff for 740*l.* for money lent by the plaintiff to the defendant. By the indorsement on the back of the writ of *capias*, the plaintiff stated his claim to be "for 740*l.* and upwards, for money due on a promissory note and interest thereon."

Stammers moved for a rule to discharge the defendant out of custody, upon the ground that there was a variance between the affidavit to hold to bail and the writ.

TINDAL, C. J.—This is not a variance. The promissory note is evidence of money lent.

Rule refused.

Nov. 6th.

DOE d. POTTER v. ROE.

Service of a declaration in ejectment on the wife of the son of the tenant on the premises, *held* to be sufficient to grant a rule nisi for judgment against the casual ejector, where it appeared that the tenant was in *America*, and that his son managed his business.

WILDE, Serjt., moved for judgment against the casual ejector. The declaration in ejectment had been served upon the wife of the son of the tenant, on the premises; it was sworn that the tenant was in *America*, and that his son managed his business in his absence.

TINDAL, C. J.—This is like the case of *Fenn d. Knight v. Dean* (a). Take a rule nisi, which must be served upon the son.

Rule granted.

(a) Barnes, 192.

Nov. 14th.

BALL v. STAFFORD.

Money paid into Court in lieu of bail cannot be transferred to the account of a payment into Court.

THE defendant being arrested on a writ of *capias* for 200*l.* he deposited that sum with the sheriff, which was subsequently paid into court in lieu of giving bail, with 10*l.* as a security for the costs, under 7 & 8 *Geo.* 4, c. 71, sec. 2.

J. Bayley moved that 81*l.*, part of the above sum, might be transferred to the account of a payment into Court to that amount.

The COURT refused the rule upon the authority of *Stultz v. Heneage* (a).

Rule refused.

(a) 10 Bing. 561.

SEWELL v. BROWN.

F. V. LEE moved for a *distringas* under 2 Wm. 4, c. 39, sec. 3. The writ of summons issued on the 29th of *January*, and the last attempt to serve it was made on the 4th of *May*.

TINDAL, C. J.—I feel great doubt whether a *distringas* can issue upon a writ which has ceased to have any operation (a). The writ ought to have been continued.

The other judges concurred.

Order refused.

(a) By 2 Wm. 4, c. 39, sec. 10, it is enacted, that no writ of summons shall be in force for more than four calendar months from the date thereof, but every such writ may be continued by *alias* or *pluries*, as the case may require.

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Nov. 22d.

A *distringas* was refused where the writ of summons had been issued more than four months, and without being continued by an *alias* writ (see 2 Wm. 4, c. 39, sec. 10.)

FIFE v. BRUYERE.

Nov. 21st.

ACTION on a promissory note. The plaintiff signed interlocutory judgment, for want of a plea, on the 24th of *June*, and obtained a rule to compute principal and interest on the 5th of *November*.

Humfrey obtained a cross-rule to set aside the judgment for irregularity, but it was held that the application was made too late: he then referred to an affidavit made by the defendant which stated that the promissory note was given for an inadequate consideration, and that in consideration of the note, the plaintiff had agreed to give up certain bills of exchange, which he had neglected to do. He therefore submitted that if the rule to compute principal and interest should now be made absolute, the defendant, who was a prisoner, would be greatly aggrieved, because the prothonotary had no power to order these bills to be given up, although he might be satisfied that that would meet the justice of the case; nor had he any power to inquire into the consideration for which the note was given.

In the case of a prisoner, and under special circumstances, the Court ordered the prothonotary, in computing principal and interest on a promissory note, to inquire into the consideration for which the note was given, and to decide on the facts as a jury would do.

TINDAL, C. J.—The whole matter may be referred to the prothonotary under the rule to compute, and he may decide upon the facts as a jury would do, after this intimation given in open court.

Humfrey's rule discharged with costs.

Wilde, Serjt., shewed cause.

Rule discharged.

LORD PAGET v. STOCKLEY.

Nov. 26th.

A RULE had been obtained to set aside the service of a writ of *capias* for irregularity, and to discharge the defendant out of custody. The irregu-

The proper indorsement on a writ of *capias* as to the pay-

ment of the debt, &c., is "within four days from the service," but a mistake in this respect may be amended on payment of costs.

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larity was, that in the copy of the writ the indorsement as to the payment of debt and costs was, if the same should be paid "within four days from the execution thereof." The form in 2 *Reg. H. T. 2 Wm. 4*, is "service."

Talfourd, Serjt., shewed cause.—He admitted the word *service* ought to have been used, but cited *Shirley v. Jacobs (a)*, as an authority that the plaintiff might amend on payment of costs.

Per Curiam.—It is now the invariable practice at chambers to amend such an irregularity as this on payment of costs (*b*).

(a) 3 Dow. P. C. 101.

be irregular. See also *Sutton v. Burgu*.

(b) In *Hooper v. Waller*, 1 Cr., Mee.,
 & Roscoe, 437, the word *arrest* was held to

1 Gale, 17.

Nov. 16th.

In re Trustees of BARBER.

The British Consul at a foreign port has authority, under 6 Geo. 4, c. 87, sec. 20, to certify the handwriting and authority of a commissioner who receives the acknowledgment of a married woman.

THE acknowledgment of a married woman had been taken in a foreign place before a commissioner duly appointed, but the affidavit was certified before a British consul, and not before a notary public.

Talfourd, Serjt. moved that the officer of the court should file the certificate of acknowledgment. In *Ex parte Hutchinson (a)* it was doubted whether a consul had power to administer an oath by which a defendant could be held to bail. But by Stat. 6 G. 4, c. 87, s. 20 (*b*), British consuls are empowered to do every notarial act which a notary could be required to do.

Gur. adv. vult.

TINDAL, C. J.—We are of opinion that the Statute empowers the consul to certify the handwriting and authority of the commissioner: this may be fairly included in the power "to do and perform all notarial acts which any notary public could be required and is by law empowered to do."

Application granted.

(a) 1 M. & P. 559.

(b) Sec. 20 enacts, "That every consul general, or consul appointed by his Majesty at any foreign port or place, should in all cases have the power of administering an oath or affirmation whenever the same shall be required, and should also have power to do all such notarial acts as any notary public may do; Be it therefore enacted, that it shall and may be lawful for any and every consul general, or consul appointed by his Majesty, at any foreign port and place, whenever he shall be thereto required, and whenever he shall see necessary, to administer, at such foreign port or place, any oath, or take any affidavit or affirmation from any person or persons whomsoever, and also to do and perform, at such foreign port or place, all and every

notarial acts or act which any notary public could or might be required and is by law empowered to do within the United Kingdom of Great Britain and Ireland; and every such oath, affidavit, or affirmation, and every such notarial act, administered, sworn, affirmed, had or done by or before such consul general or consul, shall be as good, valid, and effectual, and shall be of like force and effect, to all intents and purposes, as if any such oath, affidavit, or affirmation, or notarial act respectively, had been administered, sworn, affirmed, had, or done before any justice of the peace or notary public in any part of the United Kingdom of Great Britain and Ireland, or before any other legal or competent authority of the like nature."

WHITTAKER and O^r. v. MASON.

Com. Pleas.

Nov. 10th.

DEMURRER to replication in assumpsit.—The declaration stated that the plaintiffs, on, &c., put up and exposed to sale divers large quantities of goods, to wit, &c., 50,000 books, and 5,000 stereotype plates, under and subject to the following conditions of sale; that is to say:—Amounts under 10*l*. to be paid for in ready money; four months' credit for 10*l*.; four and eight months for 20*l*.; four, eight, and twelve months for 50*l*.; four, eight, twelve, and sixteen months for 100*l*. and upwards; to be settled by bills (with security, if required), divided according to the above terms; dated Nov. 5, 1834; imperfections to be applied for within fourteen days after the books were delivered:—as by the said conditions of sale, reference being thereunto had, will amongst other things more fully appear; of all which said premises the defendant, to wit, &c., had notice; and that thereupon the defendant then became the purchaser, according to the said conditions of sale, of divers large quantities of the said goods, to wit, &c., at and for divers prices and sums of money, as to the same quantities of goods respectively then agreed upon between and by the plaintiffs and the defendant respectively, and amounting in the whole to a sum of money exceeding 100*l*., to wit, 261*l*. 4*s*. 2*d*.; and thereupon in consideration of the premises, and that the plaintiffs, at the request of the defendant, had then promised the defendant to perform and fulfil all things in the said conditions of sale contained on their part to be performed and fulfilled, he the defendant then promised the plaintiffs to perform and fulfil every thing in the said conditions of sale on his part and behalf, as such purchaser as aforesaid, to be performed and fulfilled; and the plaintiffs in fact say, that they did, thereupon, to wit, on the 5th November, in the year aforesaid, deliver to the defendant, and the defendant then received from them the said several quantities of goods so purchased by the defendant as aforesaid, and that fourteen days after such delivery and receipt was long since elapsed, and that imperfections were not applied for in respect of the same goods, or any of them within such fourteen days; and although the plaintiff thereupon, to wit, on, &c., required the defendant to settle with him for the said several quantities of goods so purchased by him as aforesaid, by bills, with security, divided according to the terms in that behalf of the said conditions of sale; and although the plaintiffs have always hitherto, from the time of the said delivery, been ready and willing to receive from the defendant bills with security, divided as aforesaid, for the said sum of money, to wit, the sum of 261*l*. 4*s*. 2*d*., whereof the defendant then had notice, yet the defendant has disregarded his said promise, and did not, nor would when he was so required by the plaintiffs as aforesaid, or at any other time, settle for the said goods so purchased by him as aforesaid, by such bills with security as aforesaid, or otherwise howsoever, but has hitherto wholly neglected and refused so to do; and then, to wit, on the day and year last aforesaid, discharged the plaintiffs from tendering to him such bills, to be accepted and delivered by him with security as aforesaid, to the plaintiffs, contrary to the said conditions of sale and the said promise of the defendant.

Flea:—And the defendant says, that by and according to the course of dealing and usage of and amongst booksellers in London aforesaid, in the

The replication *de injuriâ* is not applicable in assumpsit when the plea does not admit the promise stated in the declaration, and excuses its non-performance; therefore such a replication was held to be ill, where the declaration was for a breach of contract in not paying for goods by bills with security, and the plea set out a custom of trade that such security was only given when it was demanded before the goods were delivered.

Whether a replication *de injuriâ* is in any case applicable in assumpsit, *quære*.

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way of their trade and business there, long before and at the time of the putting up and exposing to sale by the plaintiffs of the said goods and chattels in the said declaration in that behalf mentioned, and of the said defendant becoming such purchaser as in the said declaration is alleged, used and approved of, when goods are sold in *London* aforesaid, by booksellers, or a bookseller there to other booksellers, or another bookseller there in the way of a bookseller's trade and business, under and subject to the like conditions of sale as those in the said declaration mentioned, the security in such conditions mentioned, if the seller will require the same, is to be required before, or at the time the goods are delivered to and taken away by the purchaser thereof, and not afterwards, of which course of dealing and usage the plaintiffs, at the time of the putting up and exposing to sale by them of the said goods and chattels in the said declaration mentioned, and of the defendant becoming such purchaser as aforesaid, to wit, on, &c., had notice; and the defendant further saith, that the said goods so alleged to have been sold by the plaintiffs to the defendant, as in the said declaration is mentioned, under and subject to the said conditions of sale, were so sold in *London* aforesaid, by the said plaintiffs, then being booksellers there, to the defendant, then also being a bookseller there, in the way of a bookseller's trade and business there, and were so sold as aforesaid, subject and according to the said usage and course of dealing; and the defendant further saith, that after the time of his becoming such purchaser of the said goods as in the declaration is mentioned, to wit, on, &c., the same goods were delivered by the plaintiffs to the defendant, and taken away by him; and that he the defendant, always from the time of his becoming such purchaser of the said goods and chattels as in the said declaration is mentioned, until and at the time when the same goods were so delivered to and taken away by him as aforesaid, was ready and willing to settle and pay for the same goods, by bills with security if required, according to the said conditions of sale and the said course of dealing and usage; and that he the defendant, always from and after the time when the said goods were so delivered to and taken away by him as aforesaid, was ready and willing to settle and pay for the said goods by bills, according to the said conditions of sale and the said course of dealing and usage; but that the plaintiffs did not at any time before, or when the said goods were so delivered to and taken away by the defendant, require security for the said goods, or require the defendant to settle for the said goods by bills with security, but wholly omitted so to do, and that the plaintiffs did not at any time require the defendant to settle or pay for the said goods by bills alone, without security; and further, that the plaintiffs always after the same goods were so delivered to and taken away by the defendant as aforesaid, to wit, on the same day and year last aforesaid, and often afterwards, wholly refused to take, accept, or receive bills for the said goods, without having security also; although the said defendant after the said goods were so delivered to and taken away by him as aforesaid, to wit, on the same day and year aforesaid, offered to the plaintiffs to pay and settle for the said goods by bills, according to the said conditions of sale and the said course of dealing and usage. And this the defendant is ready to verify.

Replication.—That he, the defendant, at the said time when, and in the said count mentioned, of his own wrong, and without the cause by the defendant in the same plea alleged, committed the said breach of promise in

the said count mentioned, in manner and form as the plaintiffs have above thereof complained against the defendant; and this the plaintiffs pray may be inquired of by the country.

Demurrer, for the following causes:—That the said replication is double; also that the said replication takes too large a traverse in denying the whole of the facts alleged in the said plea; also that the said replication is a traverse *de injuriâ*, and the traverse *de injuriâ* is an improper and informal traverse in an action of assumpsit. Also that the said replication attempts to put in issue the breach, as stated in the declaration, whereas the only material matters which the said replication ought to have put in issue were the matters of the contract, as alleged in the said plea, and whether there had been any breach of the contract as therein stated. *Joinder in demurrer*.

Addison, in support of the demurrer.—The plea might have been subject to a special demurrer, on the ground that it amounted to the general issue, but it is now too late for the plaintiff to take that objection. The replication *de injuriâ* in an action of assumpsit is bad (a). At all events it is bad in this particular case, because the plea denies the contract stated in the declaration, and does not admit the promise and excuse it. In *Crogate's case* (b) it is said, "For the general plea *de injuriâ sua propria* is properly when the defendant's plea doth consist merely upon matter of excuse, and of no matter of interest whatsoever;" and that is recognised in *Com. Dig.* tit. Pleader (c); *Banckes v. Parker* (d); *Taylor v. Markham* (e). Here the plea sets up a custom by the usage of trade, and that ought to have been answered, but not by a replication of *de injuriâ*. In *Solly v. Neish* (f) such a replication was held to be insufficient; and Lord Abinger, C. B. says, "The replication appears to be bad, because the plea does not contain matter of excuse, but a denial of the promise." And in *Selby v. Bardons* (g), Lord Tenterden, C. J. held the replication *de injuriâ* to be bad, because it traversed several distinct and independent facts. So here the plea contains several material allegations, and the traverse is too large.

J. Henderson, for the plaintiff.—The plea cannot be supported, because it sets forth an unreasonable and inconsistent custom (h). The replication is good. In *Solly v. Neish* (f), the replication was *de injuriâ*, in an action of assumpsit; but the Court did not decide that such a replication is not good in that species of action as well as in trespass or replevin, but the case was decided on another point. There is, certainly, no instance in the books of such a replication in assumpsit. Before *Selby v. Bardons* (i), it was

(a) It will be seen that the Court did not decide this important question in the present case, but the arguments are now stated, as in the following Term the Court intimated, in giving judgment in *Griffin v. Yates*, that such a replication is good. This case will be reported in its proper place.

(b) 8 Rep. 67.

(c) F. 18.

(d) Hob. 76.

(e) Yeiv. 157.

(f) 1 Gale, 230.

(g) 3 B. & Ado. 18.

(h) This point was not decided by the

Court. In support of this objection, the following cases were cited, *Wigglesworth v. Dallison*, Doug. 196; *Boraston v. Green*, 16 East, 71; *Webb v. Plummer*, 2 B. & Ald. 746; *Holding v. Pigott*, 7 Bing. 465; *Yeates v. Pim*, 6 Taunt. 448; *Holt*, 59, S. C.; and *Addison* relied on *Letulier's case*, 2 Salk. 443; *Baker v. Payne*, 1 Ves. jun. 459; *Donaldson v. Forster*, Abbot on Shipping, 213; *Smith v. Wilson*, 3 B. & Adol. 728; *Clayton v. Gregson*, 1 Harr. & Woll. 159.

(i) 3 B. & Ado. 2.

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very doubtful whether it could be used in replevin; and in that case *Parke*, J. observes, that the proposition in *Jones v. Kitchen* (j), that the replication *de injuriâ* could only be allowed in actions of personal injuries, is too limited. If the question is considered as *res integra*, it is now of great importance, because, before the new rules of pleading were established, the plea of the general issue was permitted, and then a replication *de injuriâ* was unnecessary. But now, for expediency and upon general principles of law, such a replication ought to be allowed. A defendant may traverse every material fact in the declaration, and add new matter, and yet the plaintiff will be compelled to confine himself to the traverse of one allegation, unless he be permitted to reply *de injuriâ*. And it is no answer to say that this will lead to a multiplicity of issues, for the same objection would apply to the use of such a replication in trespass or replevin. In *Selby v. Bardons* (k), *Parke*, B. remarks upon this point, "It is true that these pleas in bar put in issue a great number of distinct facts; and it is also true that the general rule is, that where any pleading comprises several traversable facts or allegations, the whole ought not to be denied together, but one point alone disputed: and I am fully sensible that the tendency of such a rule is to simplify the trial of matters of fact, and to save much expense in litigation. But it is quite clear, that from a very early period in the history of the law, an exception to this general rule has been allowed with respect to all actions of trespass on the case, in the plea of the general issue; and with respect to some actions of tort in the replication of *de injuriâ sua propria absque tali causa*. This replication, where it is without doubt admissible, generally, indeed it may be said always, puts in issue more than one fact, and often a great number. For instance, in an action of assault, where there is a justification that the defendant was possessed of a house; that the plaintiff entered; that the defendant requested him to retire, and he refused; that the defendant laid his hands on the plaintiff to remove him, and the plaintiff resisted;—all these facts may be denied by this general replication." In many cases the same matters are pleaded in assumpsit as in trespass, and it is very important that some general rule should now be established. Looking at this question in a higher point of view, the principle of law should be universal. It may also be contended that the replication traverses the facts stated in the plea, and all the matters there stated make up but one united proposition, and constitute but one defence. Therefore the plea was not subject to a demurrer for being double, *Rowles v. Lusty* (l); *Carr v. Hinchcliffe* (m); *O'Brien v. Saxon* (n); *Robinson v. Raley* (o).

Addison, in reply.—It would be inconsistent with the spirit of the new rules on pleading, to allow a replication *de injuriâ* in an action of assumpsit. In *Selby v. Bardons* (p), Lord *Tenterden*, C. J., who differed with the rest of the judges, observes, "I consider the system of special pleading, which prevails in the law of *England*, to be founded upon, and to be adapted to the peculiar mode of trial established in this country, the trial by jury; and that its object is to bring the case, before trial, to a simple, and, as far as practicable, a single question of fact, whereby not only the duties of the jury

(j) 1 Bos. & Pul. 78.
 (k) 3 B. & Ado. 10.
 (l) 4 Bing. 428.
 (m) 4 B. & Cres. 547.

(n) 2 B. & Cres. 908.
 (o) 1 Burr. 316.
 (p) 3 B. & Ado. 16.

may be more easily and conveniently discharged, but the expense to be incurred by the suitors may be rendered as small as possible. And experience has abundantly proved that both these objects are better attained where the issues and matters of fact to be tried are narrowed, and brought to a point by the previous proceedings and pleadings on the record, than where the matter is left at large to be established by proof, either by the plaintiff in maintenance of his action, or by the defendant in resisting the claim made upon him." The general issue has been abolished for the very purpose of narrowing the issue to be tried, and thereby to save expense to suitors; but if this general mode of pleading is allowed, the same inconvenience will ensue, and a kind of general issue will again be allowed. The argument as to the expediency of the case is, therefore, against the use of such a replication in actions of assumpsit, and it would be in manifest violation of one of the resolutions in *Crogate's case* (q).

Cur. adv. vult.

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TINDAL, C. J.—This case comes before us upon a special demurrer to the plaintiff's replication. And the first question is, whether the replication is good in point of law. The plaintiff declares, in the first count, upon a contract of sale of certain books to the defendant, under certain special conditions set out in the declaration. To this the defendant pleads in bar, that the books were sold to him upon the conditions set out in the declaration, but subject and according to the usage and course of dealing observed amongst booksellers in *London*, by which usage and course of dealing, as stated in the plea, a material variation is made in the terms of the contract declared upon; and he concludes his plea with a verification. To this plea the plaintiff has replied in the general form, "that the defendant, of his own wrong, and without the cause by the defendant in his plea alleged, committed the breach of promise in the said first count mentioned, in manner and form," &c., concluding to the country; and to this replication the defendant demurs specially, shewing the causes of demurrer therein contained. And we are of opinion, that the replication upon the state of this record is informal and insufficient. It is well known, that this general form of replication is allowed in actions of trespass and of trespass on the case, where the defendant's plea is merely in excuse of an injury to the person or reputation of another. In those cases, although the plea may contain a multiplicity of facts, yet if they amount, when taken altogether, to an excuse of the act complained of, and contain neither matter of record nor any claim or interest in or out of land, nor any authority from the plaintiff, the plaintiff is allowed to put in issue all the facts which constitute the defendant's excuse by this general traverse.

Whether this form of replication which has hitherto been used in actions of trespass and actions on the case only, is applicable to an action upon promises, may be doubtful; but without entering into that question, it is clear, that it can only be applicable where the plea states matter which admits the promise as laid in the declaration, and excuses its non-performance.

The form and language of the replication proves this; it is a denial of the excuse contained in the defendant's plea; unless the plea, therefore, does consist of matter of excuse, there is no issue joined.

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But we think this plea, which seeks to introduce a new condition into the special promise stated in the declaration, does not admit that promise and excuse the non-performance of it, but does in effect deny that such promise was ever made. The replication, therefore, which only proposes to deny the excuse set up in a plea, where no excuse is alleged, appears to us to be informal and insufficient.

The plaintiff, however, objects to the plea itself, and if that plea is bad in substance, undoubtedly, upon the whole record, the plaintiff ought to prevail.

The objection taken to the plea is, that the defendant cannot, by law, vary the terms of a written contract by the introduction of the custom and usage of the trade, and that, as he would be precluded from shewing such custom or usage in evidence, he is equally prevented from pleading the same in bar of the action. How far a mercantile contract reduced to writing and signed by the parties, which is silent on a particular point, may have that silence supplied by evidence of a general course and usage of the trade, within the limits of which the contract was made, and to which it relates, is a question which it would be difficult to answer with exactness and precision. But in this case we think the question does not occur. For we think ourselves not bound to take notice upon this record, that there was any written contract or agreement signed by the defendant. There is no such allegation in the declaration; and although we might be led to conjecture, from some of the expressions therein used, that such was the fact, we think it by no means sufficiently clear upon the pleadings, to warrant us to infer it in support of an objection to the defendant's plea.

The plea, therefore, not having been specially demurred to as amounting to the general issue, or upon any other ground of form, we think, as the facts stated therein are admitted by the plaintiff's demurrer, that it is a plea substantially good, and therefore we give our judgment for the defendant.

Judgment for the defendant.

Nov. 13th.

PLIMLEY and an^r. v. WESTLEY.

The defendant, the indorsee of a promissory note which was not negotiable, indorsed it to the plaintiff in payment for goods; the plaintiff neglected to present the note to the maker when it became due, and it remained unpaid:—*Held*, that the plaintiff could, notwithstanding, recover the price of the goods sold from the defendant, as the note not being originally negotiable, the plaintiff had not been guilty of laches in not presenting it, and the transfer not amounting to a new making, for want of a stamp.

THE following special case was submitted for the consideration of the Court. The defendant being indebted to the plaintiffs in the sum of 21*l*. 16*s*. for goods sold and delivered, indorsed and delivered to them, and they took, on or about the 10th day of *February*, 1834, on account of such debt, a promissory note drawn by *Robert Holden*, payable to Messrs. *Ryton and Walton*, but without the words "or order," but which had then been indorsed by Messrs. *Ryton and Walton* to Messrs. *John Knight and Co.* from the latter of whom the defendant had received it for a valuable consideration. The following is a copy of such note:—

"*Leamington, January 6, 1834.*

"Two months after date I promise to pay to Messrs. *Ryton and Walton* the sum of twenty-one pounds sixteen shillings, for value received.

"*Robert Holden.*

(Indorsed) "*Ryton and Walton.*

"*P. pro. John Knight and Co.*

"*Wm. Westley, John Hancocks.*"

"At Messrs. *Ladbrookes and Co.,*

"*Bankers, London.*"

"At Messrs. *Ladbrookes and Co.,*

When the note became due, *viz.* on the 9th of *March*, 1834, it remained in the hands of the plaintiffs, but it was not presented for payment until the 18th of *March*, 1834, being nine days after it became due. It was dishonoured, and has not been paid. On the 25th day of *March*, 1834, the defendant received from the solicitors of the plaintiffs a letter demanding payment of the note. The defendant refused to pay the note or the debt, for which it was indorsed to the plaintiffs, upon the ground that he was discharged by their laches. Messrs. *Ryton and Walton*, and Messrs. *Knight and Co.*, have respectively refused to pay the note, on the ground that they were discharged from liability by the neglect to present the note for payment, and their not having received due notice of dishonour. The question is, whether the defendant is liable to the plaintiffs upon the promissory note, or for the original debt for which it was indorsed to them, or is discharged from all liability.

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S. B. Harrison, for the plaintiffs.—In ordinary cases the plaintiffs would no doubt have discharged the defendant, by their laches in not presenting the note; but this note was not negotiable at all (a). The plaintiffs therefore received that which was of no value to them, and they were guilty of no laches in not presenting the note, and the defendant had no remedy against his immediate indorser. It is said in *Hill v. Lewis* (b), that the indorsement would amount to a new making of the note; but the first stamp was exhausted, and a new one was necessary to make it valid. Secondly, If a new stamp was unnecessary, then the indorsement by the defendant operated merely as a fresh making of the note, *Penny v. Innes* (c); and in the character of maker he could not insist on laches. He was stopped by the Court.

Talfourd, Serjt., *contrd.*—By the delivery of this note the defendant undertook to pay it if the drawer did not. It was not an absolute, but a qualified contract, and the plaintiffs were bound to present the note for payment when it became due. In consequence of their laches the defendant has been deprived of his remedy. Notice of dishonour is always necessary, even in the case of bills drawn for the accommodation of the parties who made the bill, *Cory v. Scott* (d); *Norton v. Pickering* (e).

TINDAL, C. J.—The plaintiffs are entitled to judgment on the count for goods sold and delivered. The question is, whether the original debt was satisfied by the delivery of this note; and we must inquire if the plaintiffs had any power of enforcing the payment of the note or not. It is clear by the cases of *Hill v. Lewis* (b), and *Smith v. Kendall* (f), that a bill or note cannot be enforced against the original maker, by a person who takes by indorsement, unless the instrument contains words which authorize the indorsement. In this case there was a simple promise to pay the payee of the note and no one else. The plaintiffs take the note from the defendant, who could not sue his immediate indorser, nor could the plaintiffs sue the maker. I cannot therefore see what injury the defendant has sustained by reason of the laches of the plaintiffs. It is said, in *Hill v. Lewis*, that every fresh indorsement may be considered a new contract, and the indorsee a new drawer.

(a) Bayley on Bills, 97, 4th ed.

(b) 1 Salk. 133.

(c) 1 Cr., Mee., & R. 441.

(d) 3 B. & Ald. 619.

(e) 8 B. & Cres. 610.

(f) 6 T. R. 123.

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That might have been good law before the stamp duties were established, but although there was a sufficient stamp on the face of this note to make it valid as between the original parties, the stamp was insufficient to charge the parties who became indorsers of the note. As, therefore, the plaintiffs could not sue the defendant, the delivery of the note was the delivery of that which was of no value, and the parties are remitted to their original rights.

Judgment for plaintiffs.

Nov. 18th.

FOSTER and an' v. LEY.

1. A testatrix, after giving several legacies free of duty, bequeathed a part of her estate to trustees, "upon trust to pay off all and every debt and debts of her first husband that could be legally and satisfactorily proved against him, as it was her will and desire that the same should be discharged."—*Held*, that the creditors were liable to the legacy duties payable upon this bequest.

2. A bill being filed in *Chancery* to ascertain the debts due from the testatrix's late husband, the parties appeared before the Court, and the amount of the debts was ascertained and paid in full, but the Court neglected to give directions for the payment of the legacy duties pursuant to 36 Geo. 3, c. 52. The duties were subsequently paid by the executors when the accounts were passed through the Stamp Office.—*Held*, that they could maintain an action to recover the amount of the duties, against the legatees in respect of whose legacies they were paid.

A SPECIAL case stated the following facts:—This was an action on promises to recover from the defendant 67*l.* 4*s.* 4*d.*, alleged to have been paid by the plaintiffs for the use of the defendant. The defendant pleaded *non assumpsit*, and upon that plea issue is joined. The plaintiffs are executors of *Jemima Webber*, deceased. The testatrix was twice married. Her first husband, *J. W. Glubb*, died insolvent in Nov. 1804. She survived also her second husband, Mr. *Webber*, and after his death, being the owner of real and personal property, by will, bearing date the 23d March, 1829, the testatrix bequeathed as follows: I give and bequeath and direct and appoint unto *John Green* 100*l.* I give and bequeath and direct and appoint unto *George Green* and *Ann Green* 50*l.* each. I give and bequeath and direct and appoint unto the Rev. *Eduard Webber*, 100*l.* I give and bequeath and direct and appoint the sum of 100*l.* towards the funds of the *Taunton and Somerset Hospital*, and that the legacy duty thereon shall be paid by my executors in trust hereinafter named. I give and bequeath and direct and appoint the sum of 100*l.* towards the funds of the Blind and Deaf and Dumb Institution, at *Exeter*, in the county of *Devon*, and that the legacy duty thereon shall be paid by my said executors. I give and bequeath and direct and appoint unto all the servants that shall be living with me at the time of my death, the sum of 5*l.* each, and a suit of mourning each. I give and bequeath and direct and appoint the sum of 400*l.* stock, consolidated Three per cent. Bank Annuities, unto the said *A. Foster* and *W. P. Thomas*, and that the legacy duty thereon shall be paid by my said executors, upon trust, that they, the said *A. Foster* and *W. P. Thomas*, and the survivor of them, do and shall with the dividends thereof yearly, for ever, lay out the same in keeping my burying ground, in the parish church-yard of *Bishops Lydiard*, in good and complete repair for ever. All the rest, residue and remainder of my moneys, and all other my real, personal, and testamentary estate whatsoever, after the payment of my just debts and funeral expenses, and the several legacies hereinbefore by me given and bequeathed, I give, devise, and bequeath, and direct and appoint unto the said *A. Foster* and *W. P. Thomas* (the executors and plaintiffs in this cause), their heirs, &c., upon trust; in the first place to pay off all and every debt and debts of my first husband, the said *J. W. Glubb*, that can be legally and satisfactorily proved against him, as it is my will and desire that the same shall be discharged; and all the moneys remaining and unexpended, upon trust to my nephew *Simon Richards*, his executors, administrators and assigns. The testatrix died on the 26th March, 1830. She was not in any respect liable for the debts of her said first husband, and at the time of her death there was a debt of 67*l.* 3*s.* 4*d.* capable of legal and satisfactory proof,

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remaining unpaid from her said first husband to the defendant, who is a stranger in blood to the testatrix. Shortly after her death, the said *Simon S. Richards*, the residuary legatee, filed a bill in *Chancery* against the plaintiffs, as executors, in order to ascertain what were "the debts of the said *J. W. Glubb*, that could be legally and satisfactorily proved against him," and to relieve the plaintiffs from responsibility in respect thereof. The cause came on to be heard in *July*, 1831, when it was ordered amongst other things, that it should be referred to the Master, to inquire and state to the Court whether any and what debts of the said *J. W. Glubb* could be legally and satisfactorily proved against him. The Master was attended by the defendants and other claimants, and subsequently made his report, dated 26th *August*, 1833, which was absolutely confirmed by an order of the Court of *Chancery*, dated 2d *December*, 1833, whereby he certified that the above-mentioned debt, amongst others, was legally and satisfactorily proved. The cause came on for further directions on the 21st of *December*, 1833, when the Court ordered that the said *A. Foster* and *W. P. Thomas* should, out of the personal estate of the testatrix, pay the debts reported due to the several creditors named in the schedule to the Master's report, including the above-mentioned debt of 67*l.* 3*s.* 4*d.* due to the defendant, and it was ordered that the said executors should pay over the residue of the said personal estate to the said *S. S. Richards*, after deducting the costs, charges, and expenses incurred by them, and any of the parties were to be at liberty to apply to the Court as there should be occasion. The plaintiffs in this action have accordingly paid to the defendant the said sum of 67*l.* 3*s.* 4*d.* Upon the plaintiffs subsequently settling their accounts (as executors) with the Stamp Office, a claim was made on its behalf upon the plaintiffs for 67*l.* 4*s.* 4*d.* for legacy duty upon the above sum of money paid to the defendant, which claim the defendant, on request made to him by the plaintiffs, refused to discharge, in consequence of which, the plaintiffs afterwards, on the 7th of *February*, 1835, paid to the Stamp Office the said sum of 67*l.* 4*s.* 4*d.*, the legacy duty chargeable on legacies to strangers in blood to the deceased, and brought the present action against the defendant.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover from the defendant the said sum of 67*l.* 4*s.* 4*d.*?

Sir *W. Follett*, for the plaintiffs.

The Court called upon the defendant's counsel to support the case.

Crowder, for the defendant, made two points.—*First*, The action is not maintainable after the proceedings which were taken in the Court of *Chancery*. By Statute 36 *Geo.* 3, c. 52, sec. 25, it is enacted, "That if any suit shall be instituted concerning the administration of the personal estate of any person, in which direction shall be given touching the payment of any legacy, the Court shall, in giving directions, provide for the due payment of the duties thereby imposed, and shall take care that no allowance shall be made of any legacy without due proof of the payment of the duties thereby imposed." After the suit was instituted it was final in itself, and the Court of *Chancery* alone had jurisdiction to order the payment of the legacy duties.

Secondly.—The intention of the testatrix will not be effected if this payment is cast on the defendant. She desires her executors to pay off every

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debt of her first husband that can be proved against him, "as it was her will and desire that the same should be discharged." A debt is not paid off, if only nine-tenths of the amount is paid. The wish of the testatrix was, that no part of the debt should remain undischarged; but her wish is frustrated if the creditor must submit to a deduction in respect of the legacy duty. Suppose the debtor had been alive, could it be said that his debts were paid off, under such an arrangement? There are no decided cases similar to the present; but the Courts have always shewn a disposition to free legacies from the burthen of the duties. Thus, where legacies and annuities were directed to be paid "without any deductions," *Barksdale v. Gilliat* (a); "without any deduction or abatement out of the same, on any account or pretence whatsoever," *Smith v. Anderson* (b); "clear of all deductions whatsoever," *Dawkins v. Tatham* (c); "clear of the property-tax and all expenses attending the same," *Courtroy v. Vincent* (d); "free from all expense," *Gosden v. Dotterill* (e); "clear of all taxes and outgoings," *Louch v. Peters* (f); "clear of all taxes and deductions," *Stow v. Davenport* (g); they have been held to be given clear of legacy duty.

TINDAL, C. J.—It appears to me that the plaintiffs are entitled to recover in this action. Two objections have been made for the defendant: First. That the plaintiffs are not entitled to maintain an action for money paid, because this matter has been before the Court of *Chancery*, which it is said is the only Court where this question could be properly entertained, and reference has been made to section *twenty-five*, Stat. 38 Geo. 3, c. 52. But the case seems to range itself under the *twenty-fourth* section of that Statute, rather than the *twenty-fifth* section, which relates to adverse suits. The *twenty-fourth* section directs that "in case any suit shall be instituted for payment of any legacy, or residue, or part of the residue of any personal estate, and the person or persons sued for the same shall be desirous of staying proceedings in such suit on payment of the money due, or delivering or otherwise disposing of the specific effects demanded, after deducting or receiving the duty payable thereon, it shall be lawful for the Court in which such suit shall be instituted, if it shall see fit, on application in a summary way, to make such order for payment of such legacy or residue, or part of residue, or for delivering or otherwise disposing of such effects, and for payment of the duty payable thereon, and all such costs, charges and expenses attending such suit, as shall be just." But suppose the case falls under the *twenty-fifth* section, and that the direction therein contained as to the payment of the legacy duty was neglected or overlooked, it does not therefore follow that the question of duties may not be investigated before another tribunal; and it seems to me that as the legacy duty has been paid by the plaintiffs, they are now entitled to recover the amount from the defendant. The second question is, whether the action should be brought against the residuary legatee or the defendant. Now, when legacies are given, free from duty, a clear intention is shewn that the payment shall not fall upon the legatee; but on looking at the case before us, such an intention does not appear. Here the testatrix gives several legacies; in some cases she directs the duties

(a) 1 Swanston, 562.

(b) 4 Russ. 352.

(c) 2 Simons, 492.

(d) 1 Turner & Russell, 433.

(e) 1 Milne & Keene, 56.

(f) 1 Milne & Keene, 489.

(g) 5 B. & Adol. 359.

to be paid, and in other cases she is altogether silent upon the point. Then she bequeaths 400*l.* to her trustees, and gives the proceeds thereof to be laid out in keeping her burying-ground in good and complete repair, and although this is not like an ordinary legacy, yet she directs that the legacy duty thereon should be paid by her executors, shewing that she had the duties in her mind when she made her will. But in the bequest of her residuary estate, the will is altogether silent on this point. It is said that the intention of the testatrix will not be carried into effect if the legacy duty be not paid out of her estate; the words of her will are, "Upon trust to pay off all and every debt and debts of my first husband, that can be legally and satisfactorily proved against him, as it is my will and desire that the same shall be discharged;" and it is said that if the legacy duty is deducted, the debts will not be discharged: but I am far from acceding to that proposition. The payment of the legacy duty is cast upon the creditor, after he has elected to receive payment of the debt due from the husband of the testatrix, by claiming payment under the provisions of the will. The creditor might have renounced the legacy, but if he elects to accept it, he takes it subject to the payment of the duty, and it would be doing some violence to this will if we were to cast the payment on the residuary legatee.

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GASELER, J.—I am of the same opinion. This is admitted to be a legacy, and the ordinary obligation to pay the duty falls upon the legatee. Probably the testatrix was not aware that any duty was payable, but that does not appear.

BOSANQUET, J.—First, I think the plaintiffs are not precluded from recovering in this action by the proceedings in *Chancery*. The object of those proceedings was to ascertain what debts were proveable against the husband of the testatrix—that was the object of the suit, but no question seems to have been raised as to the payment of the legacy duties, and probably no person supposed that any duties were payable. It is true that the Statute contains a direction that when a suit is instituted, care shall be taken that the legacy duties are paid, but no such care was taken in the present case. The question is, now that the duty is paid, whether it ought to fall on the defendant or on the residuary legatee, and for the purpose of ascertaining this we must look at the terms of the will. The bequest as to the payment of the debts is in the nature of an ordinary legacy, but it is contended that the trusts can only be effected by paying the whole amount of the debts, leaving nothing undischarged. Now, when we look at former parts of the will, we find not only express directions that the legacy duty shall be paid out of the estate, but in the particular trust which has been mentioned by my Lord Chief Justice, the testatrix directs that the legacy duty on the 400*l.* shall be paid out of her estate. But no such direction appears in this case: as soon as the debts were ascertained in the Court of *Chancery*, the sum payable to each legatee was known and determined, but the law imposed upon the legatees the burthen of paying the duties. If they were not satisfied, they were not obliged to accept the legacies, but they might have resorted to the estate of their debtor. But the defendant having elected to take the legacy, and the executors having paid the duty payable thereon, they are entitled to recover in this action.

Judgment for plaintiffs.

Com. Pleas.

Nov. 19th.

By a policy of insurance assurance was made "including risk of craft to and from the ship" on linseed oil cakes, "free of particular average, unless general or the ship was stranded." The cakes were put on board a lighter to be landed at their destination: and the lighter stranded and sunk, whereby a particular average loss was sustained: —Held, that the underwriters were not liable.

HOFMAN and an' v. MARSHALL.

THE declaration stated that the plaintiffs, according to the usage and custom of merchants, caused to be made a certain *policy of insurance*, purporting thereby, and containing therein, that the plaintiffs did make assurance, and caused themselves to be insured, lost or not lost, at and from *Groningen to Rochester, including risk of craft to and from the ship*, upon any kinds of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the *Petronella Catharina*, whereof *J. Stertvelling* was master under God for that voyage, beginning the adventure upon the said goods and merchandizes, from the loading thereof aboard the said ship upon the said ship, &c., and so should continue and endure until the said ship with all her ordnance, tackle, apparel, &c., and goods and merchandizes whatsoever, should be arrived at *Rochester*, upon the said ship, &c. until she had moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes until the same should be there discharged and safely landed; the said ship, &c. goods and merchandizes, &c. for so much as concerned the assured by agreement between the assured and assurers in the said policy, were and should be valued at 750*l.* on linseed cakes, free of particular average, *unless the ship be stranded*; touching the adventures and perils which the assurers were contented to bear, and did take upon themselves in that voyage; they were of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever, barrety of the master and mariners, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said goods and merchandizes and ship, &c., or any part thereof, and in case of any loss or misfortune, it should be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for in and about the defence, safeguard, and recovery of the said goods and merchandizes and ship, &c., or any part thereof, without prejudice to the said insurance, to the charges whereof the assurers would contribute each one according to the rate and quality therein assured, and so the assurers were contented, and did thereby promise and bind themselves each one for his own part, their heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for the said assurance by the assured, at and after the rate of thirty shillings *per cent.* And by a certain memorandum thereunto written, corn, fish, salt, fruit, flour, and seed were warranted free from average, unless general, or the ship should be stranded; sugar, tobacco, hemp, flax, hides, and skins were warranted free from average under five pounds *per cent.*; and all other goods, also the ship and freight were warranted free from average under three pounds *per cent.*, unless general, or the ship should be stranded: and by a certain other memorandum thereunto written, it was declared that the said insurance was on linseed cakes, valued at 750*l.*, as by the said policy of insurance and memoranda, reference being thereunto had, will more fully and at large appear. The declaration then stated, that the defendant duly subscribed the policy, and averred mutual

promises of performance; that linseed cakes of the value of the moneys insured were shipped at *Groningen*; that the ship, with the said goods on board, departed and set sail from *Groningen* on her said voyage towards *Rochester*; and that after her departure from *Groningen*, and after her arrival at the said port of *Rochester*, and before the said linseed cakes were safely landed, to wit, on, &c., the said linseed cakes were, for the purpose of safely landing the same, necessarily and unavoidably taken by the master of the ship from and out of the same, and were placed by him in and on board of a certain lighter, for the purpose of safely landing the same according to the custom of the said port of *Rochester*, and of the tenor and effect, true intent and meaning of the said policy of insurance, which said lighter, so having the said linseed cakes in and on board thereof as aforesaid, was, whilst proceeding on the said voyage for the purpose of safely landing the same, by and through the force and violence of the winds and waves, and by the perils and danger of the river *Medway* and of the waters thereof, forced, driven, and cast upon and against the starlings of a certain bridge over and across the said river, and thereby became and was strained, bulged, disjointed, broke, and otherwise damaged, insomuch that by means thereof the said lighter was wholly disabled from proceeding on the said voyage; and afterwards, to wit, on, &c., by and through the force and violence of the winds and waves, and by the perils and dangers of the river *Medway* and of the waters thereof, was stranded, and was forced, driven, and cast upon and against certain shoals, and there sunk, and continued under water for a long space of time, with the said linseed cakes on board thereof, whereby the said linseed cakes became and were greatly wasted, destroyed, damaged, and spoiled, whereby the said plaintiffs sustained an average damage or loss on the said linseed cakes to a larger amount than five pounds *per cent.* on all the money insured thereon, to wit, to the amount of 70*l.* by the hundred. Breach, &c.

Demurrer.—For that the said plaintiffs have stated a particular average loss on the said goods in the said policy of insurance mentioned, without averring that the said ship in the said policy mentioned was stranded, whereas it appears by the said policy that the goods therein mentioned and thereby insured, were free of particular average unless the ship was stranded; also, for that the said plaintiffs have not stated any such loss of the said goods in the said policy mentioned, as by the terms of the said policy the said defendant is liable for; and also for that the said declaration is in other respects informal and insufficient.

Maule, in support of the demurrer.—The question upon this policy is, whether, upon a particular average loss, the underwriters are liable, although the ship has not been stranded? It cannot be contended that the stranding of the lighter amounts to a stranding of the ship; that seems to be an abundantly clear point. There are good reasons why the underwriters agree to be bound by the stranding of the ship, but their liabilities would be greatly increased if the stranding of a boat would let in all average losses. It is difficult to see how the case can be put on the other side.

W. H. Watson, contra.—The policy includes “risk of craft to and from the ship,” and the policy is to exist until “the goods and merchandizes should be discharged and safely landed.” If the former words were omitted,

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the insurers would be liable for a loss happening in a lighter, before the goods were landed. *Hurry v. Royal Exchange Assurance Co. (a)*; *Rucker v. London Assurance Co. (b)*; *Stewart v. Bell (c)*. Therefore the former words cannot apply to a loss by craft, but they must have been inserted to let in a particular average loss, upon the stranding of the craft, as well as upon a stranding of the ship. Losses by means of craft are generally average losses, because the goods are recovered in the shallow water. The reason why particular average is confined to articles of a perishable nature when the ship is stranded, is given by Lord *Kenyon* in *Nisbett v. Lushington (d)*, and the same reason applies for extending it to losses occurring by reason of the stranding of craft. Suppose the ship to be disabled, and it became necessary to remove the whole of her cargo into another ship, and that ship subsequently stranded, then the underwriters would be liable for a particular average loss. That is like the present case. At all events, supposing no average loss arises whilst the goods are in the ship, unless she be stranded, the construction of the policy must be that the underwriters are liable for all losses which occur whilst the goods are in craft.

Maule, in reply.—The policy uses the words “craft” and “ship;” but they are not synonymous words. The parties mean something different from craft when they use the word ship. But here a barge was used, and that cannot by any construction mean a ship, nor is it averred to be a ship in the declaration. The underwriters are entitled to say, we are warranted free from particular average unless the ship be stranded; but that was not the case in either of the cases cited, because in those cases there was no warranty against particular average. Ships’ boats are often used in landing goods, and if one of them, containing a single bale, were stranded, then, by the construction contended for, the policy would attach on all particular average losses which happened during the voyage. A multitude of questions would arise if such a construction should be given to this policy. As to the case of transshipment and subsequent stranding which has been supposed, it has never been decided that the underwriters would be liable, and it may be a very doubtful question.

Cur. adv. vult.

Nov. 25th.

TINDAL, C. J.—This action is brought upon a policy of insurance on goods loaded on board the ship *Petronella Catherina*, on a voyage from *Groningen* to *Rochester*, “including risk of craft to and from the ship.” The risk upon the goods is described in the usual terms, to begin from the loading of the goods and merchandize on board the said ship, and to continue “until the same should be discharged and safely landed;” and in the body of the policy a clause is inserted that the goods should be valued at 750*l.* in linseed cakes, “free of particular average, unless the ship be stranded.” There is also the usual memorandum at the foot of the policy. The loss is described in the declaration to have taken place after the ship’s arrival at the port of *Rochester*, and before the linseed cakes were safely landed, by reason of the same having been put into a lighter for the purpose of being safely landed, and the lighter striking against the starlings of *Rochester* Bridge, and being afterwards stranded, in consequence whereof the plaintiffs sustained an average

(a) 2 Bos. & Pul. 434.
 (b) 2 Bos. & Pul. 432, note.

(c) 5 Barn. & Ald. 238.
 (d) 4 T. R. 767.

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loss upon the linseed cakes to a larger amount than 5*l.* per cent. on the moneys insured on the same; and whether upon this policy, in consequence of the lighter having been stranded, the plaintiff is entitled to recover the particular average loss, is the question which has been argued before us upon a demurrer to the declaration; and we are all of opinion that the plaintiff cannot recover for this loss. The words of the warranty in question are general, with one single exception; the assured expressly warrants the linseed cakes "to be free of particular average," with the single exception "unless the ship be stranded;" and, taking the latter words to be words of condition, and that the policy is opened to cover any particular average loss on the goods if the condition has happened, according to the well established doctrine on this head, it would be enough to say, that the condition specified has never taken place; for the ship has not been stranded, and the warranty remains in full force; that is, a general warranty against liability for an average loss. And we cannot but think that if the parties had intended the warranty against particular average loss not to have been a general warranty, but a warranty limited to partial losses happening whilst the goods were on board the ship, that they would have so stated it; the more especially because the risk of the underwriters is by the very terms of the policy expressly made to continue until the goods be safely landed. For as the warranty against particular average loss follows in the same policy, without any express limitation as to its duration, it must, upon ordinary rules of construction, be construed as co-extensive with the risk which the underwriters had taken upon themselves; that is, it is a warranty until the goods be safely landed. And again, the parties having before made express mention of risk of craft as well as risk of ship, they would have made the exception wider, by extending it to the stranding of craft as well as the stranding of the ship, if such had been the real intention of the contract. Without, however, entering into the discussion of the particular difficulties which have been stated as likely to arise, by adopting the construction contended for by the assured, it seems to us sufficient to observe that it would, if adopted, very much increase the liability of the underwriters. The stranding of a lighter, in the legal technical sense of the word stranding, is an event of very frequent occurrence on a flat shore. The mere taking of the ground, and remaining there a short time, and then getting off again, would be held a stranding; and if such an occurrence were to have the effect of making the underwriter liable for all the small and trivial damage occasioned to the articles enumerated in the memorandum at the foot of the policy (which is the same warranty in terms as the present), it would involve them in much litigation; if it were to have the larger effect, as contended for in argument by the plaintiff's counsel, of letting in all former partial losses incurred whilst the articles were on board the ship, the consequences would be still more alarming. Upon the whole, we think the partial loss described in the declaration is not covered by the policy; and, therefore, give our judgment for the defendant.

Judgment for the defendant.

Com. Pleas.

Nov. 7th.

The plaintiff claimed a right to use a navigation, in respect of his occupation of a close abutting on the stream. It appeared that this close had formed a part of the *King's Head* inn, until five years before the action was brought, when it was detached, and all the acts of the navigation which were proved, were exercised by the occupiers of the *King's Head* inn, before the property was divided:—*Held*, that there was no evidence to support the plaintiff's right to a verdict, as on such evidence a grant could only be presumed to the occupiers of the inn.

BOWER v. HILL.

CASE for obstructing the navigation of a stream. The cause was tried before *Littledale, J.*, at the last *Northampton* Assizes, when the plaintiff was nonsuited (a).

The declaration stated, that the plaintiff was possessed of a certain close of land, and by reason thereof ought to have had a certain way from the said close unto and along a certain stream into the river *Nen* and back again, for himself and his servants, in boats. It was in evidence, that a close of land abutted on the stream, and formed one entire property, called the *King's Head* inn and yard, until about five years before this action was brought, when the owner of the *King's Head* inn divided a part of the yard, which included the whole of the frontage towards the stream, and that the plaintiff was the occupier of the part so divided; but he did not occupy any other part of the *King's Head* inn and yard. The evidence given for the plaintiff in support of his claim, consisted of proof of the user of the navigation, whilst the property was entire and known by the name of the *King's Head* inn and yard; and it was shewn that persons had passed up the stream in boats, and delivered grain at the granaries of the inn, and building materials for the repair of the premises. The occupiers of the inn, had also occasionally allowed persons to pass through the yard and take articles brought up the stream in boats; but no user of the stream was shewn after the division of the property. The learned judge thought that the evidence shewed that the right to use the navigation belonged to the occupiers of the *King's Head* inn and yard, and on that ground a nonsuit was entered.

Adams, Serjt., obtained a rule *nisi* to set the nonsuit aside, and for a new trial.

Hill and *Miller* shewed cause.—There was no evidence of any right of way which was appurtenant to the close occupied by the plaintiff; all the acts of user were by the occupiers of the *King's Head* inn and yard; therefore the nonsuit was right. If a grant of a way be made to the occupier of a particular house, he would have no right to divide the property into portions and allow each occupier to enjoy the way; that would be a fluctuating and more extensive user of the way than the grantor intended to make. To entitle the plaintiff to recover in this case, a grant must be presumed, *Bal-lard v. Dyson* (b); and the evidence would only shew a grant to the occupier of the *King's Head* inn and yard.

Adams, Serjt. contrd.—It was a question for the jury whether the acts of user were by the occupiers of the inn in respect of the inn.—[*Tindal, C. J.*—You might have asked the judge to take the opinion of the jury upon that point.]—The portion of the land which abutted on the navigation was in the occupation of the plaintiff, and he is entitled to the benefit of any grant

(a) This case was before the Court on a former occasion, and a new trial was then directed. See the pleadings, *ante*, 45.

(b) 1 Taunt. 379.

which might have been made for the benefit of the occupiers of the whole of the premises.

Cur. adv. vult.

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Nov. 24th.

TINDAL, C. J.—This was an action upon the case for obstruction of a right of way, claimed by the plaintiff “by reason of his possession of a close of land, from the said close of the plaintiff, unto and along a certain stream or watercourse, unto and into a certain public navigable river called the river *Nen*, and so back again, for himself and his servants to go, return, pass, and repass in boats every year, and at all times of the year, at his and their free will and pleasure.” At the trial before Mr. J. *Littledale*, he directed a nonsuit to be entered upon two grounds, one of which was, that upon the evidence, the right was found to belong to the *King's Head* inn and yard, as one entire subject, and not to the frontage occupied by the plaintiff; and as we are satisfied that the nonsuit ought to be entered upon this objection, it becomes unnecessary to advert to any other (c).

The evidence on the trial of user and enjoyment of the right of passage by boats and barges was referable to the *King's Head* inn and yard, and to those premises only. There was no other subject matter to which the user could possibly apply. The proof was, that boats went up to the *King's Head* yard and back, for various purposes, as occasion required; that coals were carried there; corn for the purpose of being deposited in the granaries in the yard; bricks, tiles, and other materials for the repair of the house. From such evidence it might fairly be left to the jury to presume a grant from the owner of the dyke or stream, to the owner of the *King's Head* inn and yard, that the occupiers of those premises might pass and repass from the same to the river *Nen* and back again, by themselves and their servants, in boats and barges, for the more convenient use and enjoyment of the same premises; and if such grant once existed, there was nothing in the evidence at the trial to shew that it has ever been extinguished or released, but for any thing that appears to the contrary, the occupier of the inn and yard has still the full right to the enjoyment of the easement created by such grant. It appeared, indeed, on the trial, that for the last five years the occupier of the *King's Head* inn had put up a pair of gates at the bottom of his yard, and had thereby separated the yard from the dyke or stream, during which time the space of ground between the yard and the stream had been in the possession of the plaintiff; and it was upon this evidence that the plaintiff rested his claim to the right of passing along the dyke, contending, that the right to the easement attached to each and every part of the land which formed any part of the *King's Head* yard; and that as he the plaintiff had the possession of the frontage of the ground adjoining to the dyke or stream, so he had the right of passage which was the subject of the grant. We think, however, such a construction of the grant would lead to very unreasonable consequences. The grant itself, if presumed to have ever existed, is still in full force. Nothing has been done by the grantee to release it. There is only a temporary discontinuance of the enjoyment, or at most a temporary suspension of the right, not any extinguishment of it. The occupier of the *King's Head* inn and yard may resume the user at any time, by taking any

(c) The other ground of nonsuit was, of the way, by the occupiers of the close, in that the plaintiff had not shewn any user their own boats.

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part of the frontage into his own possession, so as to have access to the dyke; and the consequence would be, if the plaintiff were held to be entitled to the right of passage, that two different persons would be entitled to use it for themselves and their servants with boats and barges, or indeed as many different persons as possessed any share of the frontage. This would be an unreasonable construction against the grantor, who may have been contented to grant the right to the occupier of the *King's Head* inn and yard, from his knowledge of the degree of user which would follow from the grant when so limited. Independently, however, of this consideration, we think, upon the broad ground, that if this grant were produced in evidence, the plaintiff could not bring himself within the description of the grantee, he not being the occupier of the *King's Head* inn and yard, there was no evidence whatever for the jury in support of his claim, and, consequently, that the nonsuit is right.

Rule discharged.

Nov. 5th. ATKINSON and an^r, Assignees of POTTER, a Bankrupt, v. BRINDLE.

In an action by assignees to recover money paid by a bankrupt, by way of fraudulent preference, the proper question for the jury is, whether it was paid in contemplation of bankruptcy; a contemplation of insolvency is not sufficient.

THIS action was tried before *Williams, J.*, at the last Assizes at Worcester, and the question was, whether the plaintiffs, as assignees of the bankrupt, were entitled to recover the sum of 200*l.* paid by the bankrupt to the defendant under the following circumstances:—A *fiat* had issued against the bankrupt on the 14th February, 1834, but it was not proceeded with; and *Potter* made a general assignment of his effects, in trust for his creditors, under which they were to receive less than 20*s.* in the pound. The defendant, who was an auctioneer, lent money to the bankrupt, and took his bills in payment. On the 13th of January, 1835, two bills were dishonoured; *Potter* asked for further time to pay the debt, but on the 14th of January he paid the defendant 200*l.*: on the 28th of the same month a second *fiat* issued against *Potter*, under which the plaintiffs were assignees. The learned judge told the jury, that if the payment was made in contemplation of insolvency, the plaintiffs were not entitled to recover in the action, but that it must have been made in contemplation of bankruptcy (*a*). Verdict for the defendant.

Ludlow, Serjt., moved for a new trial, on the ground of misdirection and that the verdict was against evidence.—The dishonour of the bills, and the request of *Potter* to have further time granted, amount, in point of law, to a contemplation of bankruptcy. In *Fidgeon v. Sharpe* (*b*), this question was much considered. In *Poland v. Glyn* (*c*) *Abbot, C. J.*, remarks, "I have a perfect recollection of the mode in which I left this case to the jury, and I am free to confess that my opinion now is the same as that which I expressed to them. I told them that the object of the Statute was, that the whole of the bankrupt's property should be equally divided amongst his creditors; that if at the time of a payment to one creditor, the debtor had fair grounds for anticipating bankruptcy as a probable result, and made that payment voluntarily, such payment was a fraud upon the Statute, and could not be

(*a*) 6 Geo. 4, c. 16, sec. 82.
(*b*) 5 Taunt. 539.

(*c*) 2 Dow. & Ry. 314.

supported." And *Bayley, J.*, says, "I take the general rule of law upon this subject to be, that a voluntary payment to one creditor under circumstances which must reasonably lead the debtor to believe bankruptcy *probable* (not *inevitable*, for I do not think it necessary the rule should go that length) is a fraud upon the other creditors, within the meaning of the bankrupt laws, and that money so paid may be recovered by the assignees when a bankruptcy has taken place. Here the defendant certainly did make an application upon the subject of their debt, but the bankrupt did not act upon that application; he went voluntarily and paid the money upon motives honourable certainly to him as an individual, but which cannot be recognized as a defence in law."

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TINDAL, C. J.—There is a late case upon this subject, *Morgan v. Brundrett (d)*, where Mr. Justice *Littledale* says, "To make the deposit void, two things must concur; it must have been made by the bankrupt voluntarily, and also in contemplation of bankruptcy. The late cases, with reference to the question whether a payment or delivery of goods has been made in contemplation of bankruptcy, have gone much farther than they ought. The evidence that bankruptcy was contemplated in this case was very slight." Mr. Justice *J. Parke* observes, "In order to render the deposit void, it was incumbent on the plaintiffs to shew, first, that it was made in contemplation of bankruptcy; and secondly, that it was voluntary: there was very slight evidence that it was made in contemplation of bankruptcy. The meaning of these words I take to be that the payment or delivery must be with intent to defeat the general distribution of effects which takes place under a commission of bankrupt. It is not sufficient that it should be made (as may be inferred from some of the late cases) in contemplation of insolvency. These cases, I think, have gone too far." And Mr. Justice *Patteson* adds, "The recent cases have gone too great a length. They seem to have proceeded on the principle that if a party be insolvent at the time when he makes a payment or a delivery, and afterwards becomes bankrupt, he must be deemed to have contemplated bankruptcy at the time he made such payment, but I think that is not correct: for a man may be insolvent, but yet not contemplate bankruptcy." In this case, the direction given to the jury was substantially correct. Up to the time of the act of bankruptcy, the bankrupt may do what he pleases with his property; it is an exception when, in contemplation of bankruptcy, he disposes of his property, because a fraud is then practised on his other creditors. I agree that the cases on this subject have gone too far. The proper question for the jury was, whether the payments were made in contemplation of bankruptcy. It is not suggested that the verdict would be altered upon a new trial, and I am not disposed to interfere.

PARK, J.—Mr. Justice *Parke* and Mr. Justice *Patteson* put this point on its true ground in *Morgan v. Brundrett (d)*. The direction to the jury was perfectly right.

GASELÉE, J., concurred.

BOSANQUET, J.—The direction was correct. The principle upon which money can be recovered on the ground that it was paid by way of fraudulent

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preference, is, that it is a fraud on the bankrupt laws. The contemplation of insolvency is not sufficient. Rule refused (e).

(e) See *Flook v. Jones*, 4 Bing. 20; *B. & Cres.* 44; *Churchill v. Crease*, 5 Bing. 177.
Cook v. Rogers, 7 Bing. 449; *Fordyce's* case, 1 Cowp. 117; *Hunt v. Mortimer*, 10

Nov. 5th.

BOYCE v. CHAPMAN and an^r.

By 11 Geo. 4, and 1 Wm. 4, c. 68, sec. 8, carriers are responsible for losses arising from the felonious acts of their servants. The defendant, a carrier, was sued to recover the value of a parcel lost, and slight evidence was given to raise a suspicion that his servant, who was still in his employ, had stolen the parcel: on a verdict found for the plaintiff, a new trial was refused, on the ground that the defendant ought to have called the servant as a witness.

CASE. The action was tried before *Gaselee, J.*, at the last Assizes for *Warwick*. The defendants were coach proprietors, and the action was brought to recover the value of a parcel enclosing money to the amount of 84*l.*, which it was contended was lost at their coach-office, and the issue raised was, whether the parcel was lost through the felonious act of one *Matthews*, a porter, who was in the employ of the defendants when it was lost (a). It was in evidence, that in *August*, 1834, the parcel had been forwarded from *Knutsworth* by the defendants' coach, to be taken to *Birmingham*, but it never reached the person to whom it was directed, although it was seen in the defendants' coach-office at *Birmingham*. Advertisements were circulated in *Birmingham*, describing the contents of the parcel, and in *June*, 1835, a 10*l.* note, part of the money stolen, was traced into the hands of a traveller, who stated that he had received it from *Matthews*, the defendants' porter, in exchange for other money; and it was proved that *Matthews* had applied at a neighbouring shop and received a 10*l.* note in exchange for gold, but the shopkeeper stated that he did not believe the stolen note was that which he gave to *Matthews*. *Matthews*, who was still in the defendants' service, was not called as a witness. Verdict for the plaintiff, damages 84*l.*

Balguy moved for a new trial, and contended that the plaintiff was bound to give such evidence as would prove a felony against the defendants' servant. The evidence given was scarcely sufficient to raise even a suspicion against *Matthews*, as it was not probable he would have remained in the defendants' service, and endeavoured to pass the note in the neighbourhood where it had been advertised.

TINDAL, C. J.—The defendants should have called the porter as a witness at the trial, and as they have not done so, we are not called upon to send the cause down again. The evidence before the jury was, that the note was lost in *August*, 1834, and that the same note was subsequently traced to the possession of the defendants' servant, who was their servant when the note was lost. The evidence against the servant was certainly very slight, on which no judge or jury would have convicted him, if he had been tried for stealing the note. In a criminal prosecution the servant could not be called, but here he might have disproved the charge which was made against him; and as to whether the note was received from the shopkeeper, who could have explained the transaction so clearly as *Matthews*? and he was not bound to give any evidence which would criminate himself. As this evidence would have tended to remove all doubt upon the question, and as the defendants have omitted to

(a) By 11 Geo. 1, and 1 Wm. 4, c. 68, sec. 8, common carriers are not protected from liability to answer for losses or in-

juries arising from the felonious acts of any servant in their employ.

produce it, although it was in their power, they are not in a situation to seek for a new trial.

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PARK, J.—If we granted a new trial, we should allow the defendants to hear all the plaintiff's evidence, and afterwards obtain a new trial upon the ground that they did not call a witness whom they might have called. Such a practice would be productive of the worst consequences. The verdict appears to me to be right; it would have been otherwise if the porter had satisfactorily explained his conduct in changing the note.

GASLEE, J.—I left the case to the jury, and I am not dissatisfied with the verdict.

BOSANQUET, J.—The evidence was all one way; and the defendants ought to have called the porter, who could have spoken to the facts.

Rule refused.

JACKSON v. ADAMS.

Nov. 7th.

CASE for slander. The declaration, which did not allege special damage, stated that before the committing the grievances thereafter mentioned, the plaintiff had been in a certain parish office, to wit, one of the churchwardens of the parish of *Stoke Gabriel*, in the county of *Devon*, and during his continuance in such his office, had always faithfully and honestly demeaned himself in his said office of churchwarden; nevertheless the defendant, devising and maliciously intending not only to injure the plaintiff in his said good name, fame, credit, and reputation, with and amongst all his neighbours and other good and worthy subjects of this realm, and to cause it to be suspected and believed by those neighbours and subjects, that the plaintiff had been and was guilty of the misconduct and offences thereafter mentioned to have been charged upon and imputed to him, and had grossly misconducted himself as churchwarden as aforesaid, and to vex, harass, and oppress the plaintiff, heretofore, to wit, on, &c., in a certain discourse which the defendant then had with the plaintiff in the presence and hearing of divers good and worthy subjects of this realm, of and concerning the plaintiff, and of and concerning the conduct of the plaintiff as such churchwarden as aforesaid, uttered the following words:—*Who stole the parish bell-ropes, you scamping rascal?* (meaning that the plaintiff had, whilst in the said office of churchwarden as aforesaid, been guilty of stealing bell-ropes), and the said subjects of our said lord the king, then understood that that was the meaning of the said words. At the trial before *Patteson, J.*, at the *Exeter Spring Assizes, 1835*, witnesses were called who proved the speaking of the words laid in the declaration, but they said they were not at that time aware that the plaintiff was or had been a churchwarden. A writ of inquiry, issued in a former action brought by the plaintiff against the defendant for slander, was also in evidence to shew malice (a). A verdict was found for the plaintiff, damages 5*l*.

The plaintiff brought an action for slander, and the words spoken were, "Who stole the parish bell-ropes?" Innuendo, that the plaintiff, whilst churchwarden, had stolen the parish bell-ropes:—*Held*, that the churchwarden had the possession of the bell-ropes belonging to the church, and that he could not be guilty of stealing them, and, therefore, no action would lie for the words spoken, as they did not impute an indictable offence.

The words so laid in the declaration, were held not to be proved by evidence of a conversation in which the defendant charged the plaintiff with fraudulently selling the ropes for a smaller sum than he had given for them

Erle, in pursuance of leave reserved by the learned judge, obtained a rule

(a) The admission of this evidence was the ground of an application for a new trial; but the Court refused the rule on that point. See *Jackson v. Adams, ante, 78*.

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not to enter a nonsuit, or to arrest the judgment, upon two grounds. *First*, That no evidence was given that the plaintiff had been churchwarden of *Stoke Gabriel*, or that the parties to whom the words were spoken, understood them to be referable to the plaintiff's conduct in that office. *Secondly*, in arrest of judgment, because the words spoken did not impute the commission of any indictable offence to the plaintiff.

Crowder and Elliott shewed cause.—There is no ground for entering a nonsuit; for there was evidence to go to the jury, and the rule is laid down by *Bayley, B.*, in *Lumby v. Alday* (b). "The rule is, that if the facts alleged in the declaration be proved, it is the duty of the jury to find for the plaintiff; and if these facts do not disclose a sufficient cause of action, the defendant must move in arrest of judgment. Where a defendant is satisfied that the allegations, if proved, do not establish a cause of action, he ought to demur." So here the defendant ought to have demurred to the declaration, if he thought it insufficient. Then it is said that the words do not impute an indictable offence to the plaintiff. But the bell-ropes of the church are the property of the rector or the parishioners. By 7 & 8 Geo. 4, c. 29, sec. 44, it is made felony to steal any fixture, whether made of metal "or other material," fixed in any place dedicated to public use or ornament, and a church was held to be within the meaning of the words; "or other building," under the old Statute, 4 Geo. 2, c. 32 (c). In *Rex v. Hickman* (d) an indictment for stealing the lead on a church was held good, where the property in the lead was laid in the vicar. But the charge is of stealing bell-ropes generally, and not of stealing the ropes belonging to the parish of which the plaintiff was churchwarden.

Erle, Sir W. Follett, and Newman, in support of the rule.—The plaintiff failed altogether in proving his case. The words spoken on the former occasion, and which were the subject of the action in which the writ of inquiry was executed, charged the plaintiff with selling ropes for an inadequate price, and not with stealing them. But as the churchwarden for the time being has the property in the church bells and ropes, he could not be guilty of stealing them. That he has the custody and property in the goods belonging to the church appears in *Bac. Abr.* tit. "Churchwarden," B., "The churchwardens, when chosen, are a corporation intrusted with the care and management of the goods belonging to the church, which they are to order for the best advantage of the parishioners; they are likewise enabled to take goods for the benefit of the church; but cannot dispose of them without the consent of the parishioners. They have such a special property in the organ, bells, parish books, Bible, chalice, surplice, &c., belonging to the church, that for the taking away, or for any damage done any of these, they may bring an action at law, and therefore the parson cannot sue for them in the Spiritual Court." In *Hadman v. Ringwood* (e) churchwardens brought trespass for taking a bell belonging to the church; and in *Rolle's Abr.* tit. "Churchwarden," A. 2, it is said, that "if a man takes the organ belonging to the church the churchwarden may bring an action of trespass," *Welcome v. Lake* (f). The ropes are affixed to the bells, which are not part of the

(b) 1 Cr. & J. 301.

(c) 12 East's Pleas of the Crown, 592.

(d) 2 East's Pleas of the Crown, 728.

(e) Cro. Eliz. 145, 179.

(f) *Siderfin*, 281; Com. Dig. tit. "Ecclesiae," F. 3.

really, and do not belong to the vicar, *Rea v. Hickman* (y) does not therefore apply (A).

Cur. adv. vult.

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TINDAL, C. J.—In this case the verdict for the plaintiff was given upon the second count of the declaration, and the question before us has arisen on a rule *nisi* for entering a nonsuit by the leave of the learned judge who tried the cause, or for arresting the judgment. As to the latter ground of the motion, it has been objected by the defendant, that the second count of the declaration shews no cause of action, inasmuch as the words therein stated do not impute to the plaintiff the commission of any indictable offence. And we agree upon the authorities collected by *Hawkins* in his *Pleas of the Crown*, cap. "Appeals," sec. 44 (z), that an indictment for larceny could not be supported against a churchwarden, for stealing the bell-ropes of the parish church of which he is the churchwarden. For as it is laid down in that book, he has the possession of the goods of the church, in contradistinction to the mere charge of goods, such as a butler or cook have of their master's goods. At the same time as the second count of the declaration does not import on the face of it, that the churchwarden stole the bell-ropes of the church whereof he was warden, but generally that he stole the bell-ropes; we see no ground for arresting the judgment upon the objection taken to that count. As to the application, however, for entering a nonsuit, we think the rule must be made absolute. The second count of the declaration contains an averment by way of *innuendo*, "that the plaintiff, whilst in his said office of churchwarden, had been guilty of stealing ropes, and that the subjects of our lord the king then understood that that was the meaning of the said words." Now, some *innuendo* was absolutely necessary in this case in order to make the words actionable; for the words being put interrogatively, unless there was an averment that they were intended as a charge against the plaintiff, there would be no imputation of a criminal offence having been committed by him; and in such *innuendo* the word "stealing" cannot by any reasonable intendment have any other meaning than that of the commission of the offence of larceny. But the *innuendo* so stated in the declaration was not only not supported, but was negatived by the plaintiff's own evidence given at the trial; for in order to prove the malicious speaking of the words in question, the plaintiff produced a judgment which he had obtained in an action against the defendant for slanderous words spoken by the defendant of the plaintiff at a former time, when describing the very same transaction to which the present words relate; in which judgment the words then spoken by the defendant were stated to be, that the plaintiff had fraudu-

(y) 2 East's Pleas of the Crown, 728.

(A) It was also contended, that no action would lie for slandering the plaintiff in his office of churchwarden, or if that was not so then that the words ought to have been shewn to be spoken whilst the party was in office; but the Court gave no opinion on this part of the case.

(i) "There is no necessity that the appellant have the absolute property of the goods stolen, for it seems agreed, that a carrier, or even a servant to whom goods are delivered to be carried to a certain place, or

churchwardens having possession of the goods of a church (citing 11 H. 4, 12; 12 H. 7, 27, 28, 29; 37 H. 6, 30, 31), or in general any person whatsoever who is so far intrusted with the goods of another as in judgment of law to have the possession and not the bare charge of them, may have an appeal of larceny against any one who shall steal them; for that they have a special kind of property in them against all strangers." Hawk. Pleas of the Crown, 237, 8th ed.

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tently sold the bell-ropes whilst he was in the office of churchwarden, for a much smaller sum than he had given for them, and thereby cheated the parish (j). This evidence disproved the averment in the declaration that the defendant intended to charge him with stealing the ropes; and shewed, conclusively, that the defendant had used the word "stealing" in a very different sense from that in which it is generally understood, and in which he averred that it was used in the *innuendo*, and that he intended only to impute to him that he had defrauded the parish. Upon this ground we think the plaintiff himself shewed that he had no case for the jury, and that a nonsuit must be entered.

Rule absolute for entering a nonsuit.

(j) See *Jackson v. Adams*, *ante*. 78.

Nov. 9th.

CANNELL v. CURTIS.

The plaintiff alleged that he had been appointed, and was assistant overseer of the parish of W., and that the defendant published a libel concerning him as such assistant overseer; the defendant pleaded that the plaintiff had not been appointed, and was not such assistant overseer:—*Held*, that proof of the appointment of the plaintiff by two justices, and of his having acted in the office, was sufficient evidence to support the allegation in the declaration, and that the plaintiff need not prove his previous nomination and election by the parishioners, as required by 59 Geo. 3, c. 12, s. 7.

Quere. Whether the defendant could have raised an

issue on the validity of the plaintiff's nomination and election.

An averment that the plaintiff had passed his accounts as assistant overseer, and that he had verified them on oath, was held to be supported by evidence that he had kept the accounts of the parish and verified them on oath; the accounts being headed "overseers' accounts."—*Gardner, J., dissentiente*. Vide 59 Geo. 3, c. 12, s. 7.

THE declaration stated that the plaintiff was a good, honest, true and faithful subject of this realm, and as such had always conducted himself, and until the committing of the several grievances thereafter mentioned, was always reputed and esteemed to be a person of good name, fame, and credit; that the plaintiff had never been guilty, nor until the commission of the said grievances, been suspected to have been guilty of perjury, or of any other such crime, misdemeanour, or offence, and by means thereof the plaintiff, before the committing of the said grievances, had deservedly obtained the good opinion and credit of all the good and worthy subjects of this realm to whom he was known; and also that before the committing of the grievances after mentioned, to wit, on the 31st day of March, 1834, the plaintiff had been appointed, and was assistant overseer of the poor of the parish of *West Rudham*, in the county of *Norfolk*, and had made out and passed certain accounts of him, the plaintiff, as such assistant overseer as aforesaid: the same containing, amongst other things, an account of the receipts and disbursements of the said plaintiff, as such assistant overseer, and which said accounts, so made out as aforesaid, the said plaintiff, before the committing of the said grievances, on the day and year last aforesaid, had verified on the oath of the said plaintiff. Yet the said defendant well knowing the premises, but contriving and maliciously intending to injure the said plaintiff in his said good name, fame and character, and to bring him into public scandal, infamy and disgrace, and to subject him to the pains and penalties by law provided against persons guilty of the crime of perjury; and to cause it to be suspected and believed that the plaintiff had conducted himself improperly and extravagantly in his said office of assistant overseer, and that the said accounts so by him made out and verified on oath, as aforesaid, were in the knowledge of the said plaintiff, at the time they were so verified on oath, incorrect; and that he, the said plaintiff, by so verifying the same accounts on oath, had been guilty of perjury, heretofore, to wit, on the 12th day of

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June, A.D. 1834, wrongfully and unjustly did compose and publish a certain false, scandalous, malicious and defamatory libel, of and concerning the said plaintiff, and of and concerning him as such assistant overseer as aforesaid, containing the several false, scandalous, malicious and defamatory words and matters following, of and concerning the said plaintiff, and of and concerning him as such assistant overseer as aforesaid, and of and concerning the said plaintiff's said accounts, and the said verification thereof by the said plaintiff, on oath, as aforesaid, that is to say:—

“ These disbursements (meaning the said disbursements) I (meaning the said defendant) consider improper, and incorrect, and are passed and balanced without my (meaning the defendant's) knowledge, or consent, and the person (meaning the said plaintiff) who has sworn to them (meaning the said accounts) has perjured himself in the most deliberative and wilful manner.”

Pleas.—*First*, Not guilty.—*Second*, That at the said time mentioned in the declaration the said plaintiff had not been appointed, and was not assistant overseer of the poor of the parish of *West Rudham*, in the said county of *Norfolk*, and had not made out and passed certain accounts of him, the said plaintiff, as such assistant overseer as aforesaid, the same containing, amongst other things, an account of the receipts and disbursements of the said plaintiff as such assistant overseer, and which said accounts so made out as aforesaid, the said plaintiff, before the committing of the alleged grievances in that count mentioned, had not verified on the oath of the said plaintiff; and of this the defendant put himself upon the country, &c. Issue was joined on both pleas.

At the trial before Lord *Abinger*, C. B., at the last Assizes for *Norfolk*, the appointment of the plaintiff as assistant overseer for *West Rudham* (a) (under the hands and seals of two justices) was in evidence; it recited “ that the plaintiff had been nominated and elected assistant overseer of the parish, and it directed the plaintiff, within four days after the end of each year, to yield a just, true, and particular account of all moneys received and paid by him, which was to be entered in a book, and signed by him, and verified on oath.”—It was also proved that the plaintiff had acted as assistant overseer. It appeared that the plaintiff kept a book containing entries of all his receipts and payments,

(a) Stat. 59 Geo. 3, c. 12, s. 7., enacts, “ That it shall be lawful for the inhabitants of any parish, in vestry assembled, to nominate and elect any discreet person or persons, to be assistant overseer or overseers of the poor of such parish, and to determine and specify the duties to be by or (a) them executed and performed; and to fix such yearly salary for the execution of the said office, as shall by such inhabitants in vestry be thought fit; and it shall be lawful for any two of his majesty's justices of the peace, and they are hereby empowered, by warrant under their hands and seals, to appoint any person or persons who shall be so nominated and elected to be assistant overseer or overseers of the poor, for such purposes, and with such salary as shall have been fixed by the inhabitants in vestry; and such salary shall be paid out of the money raised for the

relief of the poor, at such times and in such manner as shall have been agreed upon between the inhabitants in vestry, and the respective persons to be so appointed; and every person to be so appointed assistant overseer shall be, and he is hereby authorized and empowered to execute all such of the duties of the office of overseer of the poor, as shall, in the warrant for his appointment, be expressed, in like manner and as fully to all intents and purposes as the same may be executed by any ordinary overseer of the poor, and every person or persons so appointed, shall continue to be an assistant overseer of the poor until he or they shall resign such office, or until his or their appointment shall be revoked by the inhabitants of the parish in vestry assembled, and no longer.”

(a) *Sic*.

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which were headed "overseers accounts;" but the overseers of the parish did not interfere in the management of the parochial expenditure; and at the end of the year the plaintiff had verified these accounts upon oath before two magistrates, who allowed the accounts, and the following indorsement was made and signed by the magistrates, at the bottom of the book.—"March, 31st, 1834.—Verified on oath of *A. Cannell*, overseer of the parish of *West Rudham*, and allowed by us until just cause shewn to the contrary." The libel was proved to have been written by the defendant in this book.

Verdict for the plaintiff, damages 50*l*.

Storks, Serjt., by leave reserved, moved to set aside the verdict, and to enter a nonsuit, on three grounds: *First*, the appointment of the plaintiff, as assistant overseer, was not sufficiently proved at the trial: *Secondly*, there was no proof that the accounts were the plaintiff's accounts, as assistant overseer; and *Thirdly*, the writing did not amount to a libel, because the assistant overseer is not bound by law to verify his accounts on oath.

Biggs Andrews shewed cause.—The plaintiff proved sufficient at the trial to sustain the declaration; it contains two statements: first, that the plaintiff had been appointed, and was assistant overseer; and secondly, that he had made out and passed certain accounts as such assistant overseer, which he had verified on oath. The plea traverses these statements, and it will be contended that the plaintiff ought to have gone into proof of his nomination and election by the parish, as well as of his appointment. But the issue is raised by the plea, not upon the nomination or election, but upon the appointment: and the appointment under the hands and seals of two magistrates, in pursuance of 59 *Geo.* 3, c. 12, s. 7, was in evidence. This was at least *prima facie* evidence, and no evidence was offered by the defendant to contradict it. The appointment recites that the plaintiff had been nominated and elected by the parish, and it will be presumed that the justices acted correctly. But there was also proof that the plaintiff had acted in his office; and in order to prove a general allegation that a party holds a particular office or situation, it is usually sufficient to prove his acting in that capacity. In the case of peace officers, justices of the peace, and constables, it is sufficient to prove that they acted in those capacities, even upon an indictment for murder, *Berryman v. Wise* (b). So, upon an indictment for perjury in taking an oath before a surrogate, evidence that the officer has acted as such, is *prima facie* evidence of his authority, *Rex v. Verelst* (c). Even to support a general averment that a man is a physician, there are authorities to shew, that it is sufficient to prove that he acted as such, although it may be different if he avers that he has duly taken his degree, as in *Moises v. Thornton* (d). In an action by an attorney for his fees, an allegation that he is an attorney of the *K. B.* is supported by proof that he has acted as such, *Berryman v. Wise* (b). But in cases where, from the precise and special nature of the allegation the due appointment of the party to any office or situation must be proved, then, according to the general rule, it must be proved by the best evidence which can be offered, *Collins v. Carnegie* (e). The plaintiff

(b) 4 T. R. 366.
(c) 3 Campb. 432.

(d) 8 T. R. 303.
(e) 1 Ado. & Ellis, 695.

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does not allege that he was duly appointed.—[*Tindal*, C. J.—That he was appointed must mean that he was duly appointed.]—The proof of the appointment of the plaintiff by the justices, and that he had acted in pursuance of the appointment, is sufficient proof that he was assistant overseer. Then, as to the verification of the accounts upon oath: The overseers did not entirely superintend the affairs of the parish, but one acted during one half of the year, and the other during the other half. It was proved that the receipts and disbursements entered in the book in which the libel was written, were all given and made by the plaintiff, and the book contained his signature. It is objected that the accounts were headed “overseers’ accounts,” but that may be explained, and the evidence shewed that they were the plaintiff’s accounts.—[*Tindal*, C. J.—I do not see how the overseers could swear to the accounts.]—By 59 *Geo.* 3, c. 12, s. 7, the assistant overseer is empowered to exercise all the duties which shall be expressed in his appointment as fully as an ordinary overseer, and by this appointment the plaintiff was required to account, on oath, for all moneys received by him. But whether the allegation, that the plaintiff was assistant overseer, be made out or not, the libel would still remain, and it would be actionable whether written of the plaintiff as an overseer or not, *May v. Brown* (f); *Lewis v. Waller* (g); the allegation was therefore immaterial, and if immaterial it need not be proved, *Williams v. Stott* (h).

Storks, Serjt., and *Palmer*, *contra*.—The plaintiff has averred that he had been appointed assistant overseer, which is in fact an averment that he was duly appointed; and that is the issue raised by the plea. He would not be duly appointed unless the appointment was made in pursuance of the nomination and election by the parishioners, in vestry assembled, as directed by Stat. 59 *Geo.* 3, c. 12, s. 7. In *Moises v. Thornton* (i), where the plaintiff alleged that he had duly taken the degree of Doctor of Physic, it was held, that it was not sufficient for the plaintiff to produce the instrument conferring the degree, without shewing that the seal attached to it was the seal used by the University, and in that case there was no plea which raised the question.—[*Tindal*, C. J.—Would it have been competent for the defendant to have shewn any informalities in the previous proceedings, before the diploma was granted?—In *Pickford v. Gutch* (cited in *Moises v. Thornton*) (j), it was held insufficient for a plaintiff to prove that he had acted as a physician, where he alleged in the declaration “that he had used and exercised the profession of a physician.” In *Smith v. Taylor* (k), the Court were equally divided in opinion whether the plaintiff, having alleged that he was a physician, was not bound to prove that he was lawfully authorized to practise.—Secondly, the accounts which were passed, and verified on oath, were not the accounts of the assistant overseer; they were called “overseers’ accounts,” and the plaintiff, as assistant overseer, was not bound to verify them upon oath. The plaintiff was bound to shew that he was assistant overseer, as he averred that fact in the declaration, *Sellers v. Till* (l). And it is only where an innuendo is insensible or repugnant, that it may be rejected, but not when

(f) 3 B. & Cres. 113.

(g) 3 B. & Cres. 138, note.

(h) 1 Cr. & Mee. 675.

(i) 8 T. R. 307.

(j) 8 T. R. 305.

(k) 1 Bos. & Pul. New Rep. 196

(l) 4 B. & Cres. 655.

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it is a substantive allegation in the declaration, *Williams v. Stott* (m); *May v. Brown* (n).

TINDAL, C. J.—This rule for entering a nonsuit must be discharged. The objection is, that the issue raised on the plea ought to have been found for the defendant. The allegation in the declaration, of which the plea is a special traverse, is that the plaintiff had been appointed, and was an assistant overseer, and had made out and passed certain accounts as such assistant overseer, the same containing an account of the receipts and disbursements of the plaintiff as such assistant overseer, and which the plaintiff had verified on oath: then in the plea there is a distinct denial of this allegation, and two objections have been made; first, that the plaintiff was not proved to have been duly appointed an assistant overseer; and secondly, that it was not proved that he had made out and passed certain accounts of him the plaintiff as such assistant overseer, and had verified such accounts upon oath. As to the first objection, the evidence is that the plaintiff was regularly appointed by magistrates having power to act, and this is a complete answer to this objection; the cases show that if the plaintiff had merely proved that he had acted as assistant overseer it would be sufficient. But it is said on the part of the defendant, that as the plaintiff has alleged that he was appointed, as well as that he was overseer, he ought therefore to have proved a good appointment *in omnibus*. But the allegation in the plea goes no further than to state that it was not an appointment in fact. By the Statute (o), the nomination and election of the assistant overseer by the parishioners is one thing, and the appointment by the magistrates is a separate and distinct act. If it had been the object of the defendant (and I do not say he could do so) to put the nomination and election in issue, he should have pleaded, that by a certain Statute, such a nomination and election was necessary, and so the point would have been raised. If we were to allow an investigation to be made of all the prior circumstances relating to the election of the plaintiff, under such an issue as is now on the record, the plaintiff would come to the trial unprepared. In *Moises v. Thornton* (p), it was alleged that the plaintiff was a physician, and it was held that this allegation would be made out by the production of the plaintiff's diploma, and by proof that the seal affixed was the seal of the University, although it was there contended that the plaintiff ought to have shewn that the University had power to grant the diploma, and that the persons who issued it were duly authorised to do so. Nothing was there in issue but the fact of the diploma having been granted: so here there was nothing in issue but the appointment of the plaintiff.

The second objection is, that the accounts which were passed and verified on oath, were not the accounts of the plaintiff. These accounts were headed as being the accounts of the original overseers. I am far from saying that this was not the most correct manner of keeping the accounts. The name of the principal to a deed is always signed by his agent, under a power of attorney, and the mere circumstance of these accounts being kept in the name of the two overseers does not seem to be material. The third point is, that the plaintiff could not be guilty of perjury, because he had no right, under the Statute, to render his accounts upon oath: but upon looking at the

(m) 1 Cr. & Mee. 675.
 (n) 3 B. & Cres. 113.

(o) 59 Geo. 3, c. 12, s. 7; ante, 343, n. (a)
 (p) 8 T. R. 303.

Statute, it appears that the assistant overseer is empowered to do all the acts specified in his appointment, and one of those acts which is contained in this appointment is that the plaintiff shall verify his accounts upon oath. The verdict for the plaintiff must therefore stand, and this rule must be discharged.

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PARK, J.—My opinion goes fully with every thing which has been said by my Lord Chief Justice.

GASELME, J.—The justice of the case is entirely with the plaintiff, but I doubt whether the allegation, that the plaintiff delivered his accounts as assistant overseer, is made out; the accounts are not headed as the accounts of the assistant overseer, but are called "overseers' accounts (q)."

Rule discharged (r).

(q) The nature of the office of an assistant overseer was considered in *Bennett v. Edwards*, 7 B. & Cres. 593; *Holroyd, J.* said, the law knows what an overseer is, but it does not know what is an assistant overseer.

(r) Mr. J. Bosanquet was sitting as one of the Lords Commissioners of the Great Seal.

CLARK and an^r. Assignees of SCRIVENER, a Bankrupt,
v. GILBERT.

Nov. 10th.

ASSUMPSIT to recover certain sums of money alleged to have been had and received by the defendant to the use of *Scrivener*, before his bankruptcy, and to the use of the plaintiffs as his assignees since the bankruptcy. A general verdict was found for the plaintiffs, damages 331*l.* 16*s.*, subject to the opinion of the Court on the following case:—

One *Scrivener* was indebted to the defendant, an attorney, who had a lien on an indenture of lease relating to premises belonging to *Scrivener*, as a security for his debt. A commission in bankruptcy issued against *Scrivener*, and an assignee being appointed, the defendant acted as solicitor to the commission: A petition was presented to supersede the commission, on

By indenture of lease, bearing date the 17th of *November*, 1828, certain premises in *Ratcliffe Highway* were demised by *Abraham Gole* to *Scrivener*, the bankrupt, for eighty-one years, at a rent of 100*l.* At the time of issuing the commission against *Scrivener*, he was indebted to the defendant, an attorney, in 234*l.* for moneys advanced to him by the defendant, and for professional business done: and the defendant had possession of the lease as *Scrivener's* attorney. Whilst the defendant was in possession of the lease, namely, on the 5th of *December*, 1829, *Scrivener*, by indenture, mortgaged by way of demise, part of the said premises to his father, *Abraham Scrivener*, to secure 600*l.* and interest. On the 30th of *December*, 1829, a commission of bank-

the ground that there was no valid petitioning creditor's debt, and the defendant, with notice of that fact, joined the assignee in an assignment of the said lease to a purchaser, and out of the purchase-money the assignee paid defendant the debt due from the bankrupt, and also a part of the amount of his bill as solicitor to the commission: the defendant also received, by the authority of the assignee, certain sums of money accruing from the rents of the premises, in part liquidation of the debts due to him; after these facts occurred the commission was superseded, and the plaintiffs were appointed assignees under a new fiat which was issued.

Held, that the plaintiffs could recover the sums received by the defendant in an action for money had and received, for by parting with the lease the defendant was guilty of a conversion, and the plaintiffs were therefore entitled to waive the tort and sue in assumpsit; and that as to the rent received by the defendant, it was money received to the use of the plaintiffs after notice of an act of bankruptcy, and as the first assignee was not assignee *de jure*, his assent to the payments made no difference.

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rupture was issued against the mortgagor, upon the petition of one *Stevens*, who was afterwards appointed sole assignee of the estate of the bankrupt; and an assignment thereof was made to him accordingly. The defendant was *Stevens's* attorney, both as petitioning creditor and assignee under the commission, which commission was afterwards superseded, as hereinafter mentioned. On the 26th of *March*, 1830, a petition was presented by *Augustus White*, a creditor, to supersede the commission, on the ground of the insufficiency of the petitioning creditor's debt; upon which petition the defendant appeared as solicitor for *Stevens*, the assignee, and after some time an order was made upon that petition to supersede the commission. After notice of the commission, and whilst the same was pending, *Stevens*, the assignee, with the concurrence of the defendant, caused the interest of the bankrupt in the premises comprised in the said lease, subject to the mortgage, to be sold by auction, and one *Pound* became the purchaser at the price of 350*l.* At the time of the purchase *Pound* paid 50*l.* into the hands of the auctioneer by way of deposit, who, after retaining 46*l.* 6*s.* for the expenses, paid over the balance, amounting to 3*l.* 14*s.* by his check to *Stevens*, which check *Stevens* immediately paid to the defendant, on account of his costs, and the lien which he claimed on the deeds. By indenture dated the 8th of *June*, 1830, between *Stevens* as assignee, of the first part, the bankrupt of the second part, and the said *Pound* of the third part, reciting the mortgage to *Abraham Scrivener*, and also that in consideration thereof it had been agreed between *Stevens* and *Pound*, that *Pound* should take the premises subject thereto, and should pay *Stevens* 350*l.* and no more; *Stevens* and the bankrupt assigned the lease, and the premises thereby demised to *Pound* for that sum, subject to the mortgage, and also subject to certain under leases. The assignment to *Pound* was prepared by his attorney, and was approved of on *Stevens's* behalf by the defendant, and executed in his office. At the time of the execution of the assignment, *viz.* *June*, 1830, the residue of the consideration-money, being 300*l.*, was paid by the attorney of *Pound* to *Stevens*, the assignee, and by him to the defendant, by whom it was received generally, the defendant having a claim for such lien as aforesaid, and *Stevens* being indebted to him for costs. In 1830, the defendant, by *Stevens's* authority, as assignee, received 10*l.*, a debt due to the bankrupt from the owner of the house adjoining the said premises in *Ratcliffe Highway*, for contribution towards the expense of erecting a party-wall according to an agreement made between such owner and the bankrupt before his bankruptcy; and 6*l.* 10*s.* and 11*l.* 18*s.* for rent in respect of the demised premises.

At the time of the receipt by the defendant of the said sums of 3*l.* 14*s.*, 300*l.*, 10*l.*, 6*l.* 10*s.* and 11*l.* 18*s.* he had also a claim against *Stevens* for his professional bill for business, in suing out and prosecuting the said commission of bankruptcy, which claim, together with the said sum due from *Scrivener* at the time of his bankruptcy, considerably exceeded the amount of the sums so received.

The said lease remained in the possession of the defendant after the execution of the mortgage, and from thence until after the receipt, by the defendant, of the said sums of 3*l.* 14*s.*, 300*l.*, 10*l.*, 6*l.* 10*s.*, and 11*l.* 18*s.*

By indenture dated the 5th of *August*, 1831, between *Abraham Scrivener*, the mortgagee, of the one part, and *Pound* of the other part; which indenture was settled and approved of by the defendant on behalf of *Pound*, reciting that

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the bankrupt had built upon the said land several messuages ; that the said *A. Scrivener* had, in 1830, undertaken, on account of the bankrupt, to pay out of his said mortgage money unto the defendant, several sums of money, amounting to 234*l.* ; that the said *A. Scrivener* had, on the 8th of *June*, 1830, become liable to pay unto the defendant on account of the bankrupt the further sum of 50*l.* ; that *A. Scrivener*, being very desirous of having his mortgage-money paid, and of adjusting his several liabilities on account of the bankrupt, and of satisfying a further debt due from the bankrupt to the defendant, had applied to *Pound* to pay to him the said sum of 600*l.* ; but that *Pound* had prevailed upon the defendant to release the said *A. Scrivener* and the bankrupt, from all claims and demands whatsoever, and to take his security for the due performance of all such liabilities and payments as aforesaid ; that such arrangement had been approved of by the said *A. Scrivener* ; that the said *A. Scrivener* had consented to receive the further sum of 240*l.* in full satisfaction of his said mortgage debt ; that *Pound* had secured, to the satisfaction of the defendant, the money so due to him from *A. Scrivener* and the bankrupt ; that in consequence thereof the defendant had, by deed, released *A. Scrivener* from all liabilities in respect of the bankrupt, and in like manner had released the bankrupt from the said debt.

It was witnessed, that in consideration of the sum of 240*l.* paid by *Pound* to *A. Scrivener*, the said *A. Scrivener* did thereby grant unto *Pound* the premises comprised in the indenture of mortgage, and also the indenture of lease and mortgage, to hold the same unto *Pound* for all the remainder of the said mortgage term, so as that the said term might merge and fall into the reversionary and other estates and term of *Pound* in the said premises, and form part thereof.

That the deed of the 5th of *August*, 1811, was approved of by the defendant, on behalf of *Pound*, and was executed in the defendant's office, and in his presence.

On the 16th of *January*, 1832, the commission of bankrupt was superseded, upon the petition of the said *Augustus White*. On the 14th of *March*, 1832, a fiat in bankruptcy was awarded against *Scrivener*, upon the petition of *T. F. Sibley*, under which he was duly declared a bankrupt, upon an act of bankruptcy committed on the 21st of *December*, 1829. The plaintiffs were afterwards duly appointed assignees under such fiat, and the estate of the bankrupt became thereby vested in the plaintiffs.

At the trial the plaintiffs put in evidence the following documents. *viz.* the first commission bearing date, the 30th *December*, 1829 ; the petition to supersede the same, dated 28th *March*, 1830 ; the supersedeas, dated 10th *January*, 1832 ; the fiat, dated 14th *March*, 1832, and enrolled 6th *March*, 1833 ; the appointment of the plaintiff, *Clark*, as official assignee, dated 24th *March*, 1832 ; and the appointment of the plaintiff, *White*, as assignee, dated 10th of *April*, 1832. *Stevens* was called, who stated that he was indebted to the defendant between 300*l.* and 400*l.*, in respect of the first commission, and subsequent proceedings ; that the bankrupt, prior to his bankruptcy, told him that the lease and title deeds were deposited with the defendant, to whom he owed between 200*l.* and 300*l.* ; that the defendant had a lien thereon, and that he, *Stevens*, had paid the 3*l.* 14*s.*, and 300*l.* to the defendant, and allowed him to receive the other sums. The question for the opinion of the Court was, whether, upon this state of facts, the plaintiffs were entitled

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to recover any, and if any, which of the said sums of 3*l.* 14*s.*, 300*l.*, 10*l.*, 6*l.* 10*s.*, and 11*l.* 18*s.*?

J. Manning, for the plaintiffs.—It will be objected that there is no privity between the plaintiffs and the defendant, and that this action ought to have been brought against *Stevens*: but *Stevens* was never a good assignee, for there was no petitioning creditor's debt to support the commission of bankruptcy, and therefore he received the money without any authority, in the character of a perfect stranger; and the money being traced to the hands of the defendant, he is in the situation of a person who has received, and has in his hands a part of the bankrupt's estate, and is liable to be sued, *Stead v. Thornton* (a); *Walker v. Laing* (b). There is as much privity in this case as there is in the ordinary action brought by an assignee against the sheriff when he has taken the goods of a bankrupt; and that action may be in trover, as well as for money had and received. The defendant was aware that the commission was disputed, and he ought to have waited until its validity was determined. The transaction does not differ from the ordinary case of a creditor receiving money after notice of an act of bankruptcy.

The lien set up by the defendant was an afterthought, and inasmuch as an attorney has a general lien on all deeds in his possession he might have retained possession of the lease, and an action of trover could not then have been sustained, unless the lien was first satisfied. But the defendant had clearly no authority to sell the thing pledged.

Busby, for the defendant.—It may be admitted that if any fraud on the part of the defendant had appeared on the case, he would not be entitled to retain this money, *Clarke v. Shae* (c). No authority has been produced to shew that an assignee appointed under a second fiat, can sue a party who has received money from the assignee who was originally appointed under a superseded fiat. The judgment of *Parke, J.*, in *Stead v. Thornton* (d), is to the effect that such an action could not be maintained. If the defendant received the money as the agent of *Stevens*, the plaintiffs cannot recover. *Stephens v. Badcock* (e); *Baron v. Husband* (f): and there can be no doubt but that *Stevens* was liable to be sued (g). If, on the other hand, the defendant received the money as a creditor he is not liable to refund it, for *Stevens* was legally appointed assignee.—[*Tindal, C. J.*—He was assignee *de facto*, but the commission was afterwards superseded.]—Nor is this like an action of trover, where the chattel can be identified, *Gould v. Thayer* (h), for this money paid by *Stevens*, cannot be traced into the hands of the defendant, *Miller v. Rice* (i); *Rogers v. Kelly* (j); *Sumpter v. Cooper* (k).

At all events the defendant was entitled to hold the deed as a lien for the general balance due to him, *Stephenson v. Blakeslock* (l).

Manning, in reply.—The plaintiff lost his lien when he parted with the possession of the lease, and he might have been sued in trover, for he had

(a) 3 B. & Adol. 357, note.

(b) 7 Taunt. 668.

(c) Cowp. 197.

(d) 3 B. & Adol. 358.

(e) 3 B. & Adol. 354.

(f) 4 B. & Adol. 611.

(g) See *Munk v. Clarke*, ante, 310

(h) 6 Bing. 738.

(i) 1 Burr. 452.

(j) 2 Campb. 123.

(k) 2 B. & Adol. 223.

(l) 1 M. & S. 535

been guilty of a conversion. And the assignees are entitled to waive the *tort*, and to substitute this action of *assumpsit*, which is in favour of the defendant (m).

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TINDAL, C. J.—In this case the plaintiffs, who are assignees of the bankrupt, *Scrivener*, sue for money had and received by the defendant since the bankruptcy, to their use as assignees. All the money which has come to the hands of the defendant, consisted of payments made to him in the course of the year 1830, and consequently, subsequent to the act of bankruptcy, which took place on the 21st of *December*, 1829; such payments, however, were made to the defendant under circumstances which will fall under two distinct heads of consideration.

No question can arise in this case, on the ground that the fiat of bankruptcy, under which the present plaintiffs are assignees, was not awarded until the 14th of *March*, 1832; because the former commission, which was superseded, was in force before and at the time when the several payments in question were made; and such payments must consequently be taken to have been made after notice of an act of bankruptcy, according to the provision of the *eighty-third* section of the last bankrupt act, and to be protected by the provisions of that Statute.

The facts, indeed, of the present case, can leave no doubt that there was not only constructive, but actual notice of the act of bankruptcy on which the present fiat was awarded; the former commission having been taken out by the defendant himself, as solicitor to *Stevens*, the petitioning creditor, and the defendant having been afterwards appointed, and having acted as solicitor to the first commission, when *Stevens* had been chosen assignee.

Now the ground upon which the defendant disputes the plaintiffs' right to recover in the present action, is shortly this; that all the payments were made to the defendant by *Stevens*, the assignee under the first commission, or with his concurrence, whilst such first commission was in full force; and that they were made by him in satisfaction of a debt due from the bankrupt to the defendant, for which the defendant held a lease and title deeds of the bankrupt, as a pledge, or security. And it is argued that there can be no privity of contract between the present plaintiffs, the assignees under the second fiat, and the defendant, a creditor under the first commission, but that the only action maintainable by the present assignees for the recovery of money of the bankrupt which came to *Stevens's* hand, must be an action against *Stevens* himself, not against the separate creditors, amongst whom he divided it. And the case of *Stead v. Thornton* (n) is relied upon as affording an inference, that such was the opinion of the Court of *King's Bench*. It was also further objected, that as the money was first received by *Stevens*, and then handed over by him to the defendant, this money cannot be followed into the hands of the defendant by any mark or trace, but must be considered, for the purpose of being recovered, as still remaining in the hands of *Stevens*. We think, however, the facts stated in this case, will enable us to come to a decision upon it, without giving any opinion upon the abstract question which has been argued before us.

For as to two of the sums in dispute, *viz.* the sum of 300*l.* and the sum of 3*l.* 14*s.*, it appears that they were part of the proceeds arising from the sale of a lease belonging to the bankrupt. Now that lease, at the time of

(m) See *Munk v. Clarke*, ante 313.

(n) 3 B. & Adol. 357, note.

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Nov. 24th.

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(m) See *Munk v. Clarke*, ante 313.

(n) 3 B. & Adol. 357, note.

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such sale, was in the possession of the defendant, as a pledge or security for the payment of his demand against the bankrupt, being either in his possession as solicitor, under a claim upon it for his lien, which the law gives him, or having been expressly deposited with him as a security for his demands, according to the evidence of *Stevens*. In either case the right and power of the defendant over the lease was precisely the same; he had the right to retain the lease in his possession until his demand was paid, and so far, by means of the possession of the lease, to enforce payment of his demand; but he had that right only: he had no right to sell the lease, and to pay himself his demand out of the proceeds. So long as the lease remained in his possession neither the bankrupt nor his assignee could retake it without either payment of the demand, or a tender and refusal, which is equivalent to payment. But if, instead of keeping the thing pledged, he sells it, or enables any other person to sell it, by concurring in the sale, he is guilty of a direct conversion, and makes himself liable for the value of the lease in an action of trover. Such a case is the same in principle as that put by *Littleton*, sec. 71, "If I lend to one my sheep to tathe his land, or my oxen to plough the land, and he killeth my cattle, I may well have an action of trespass against him, notwithstanding the lending." On which Lord *Coke* adds this commentary, viz. "The reason is, that when the bailee, having but a bare use of them, taketh upon him, as an owner, to kill them, he loseth the benefit of the use of them. Or in these cases he may bring an action of trespass on the case, for the conversion, at his election." Or again, the case becomes that of the working of a distress, or the sale of a distress, before the Stat. of *William & Mary* gave a power of sale, which was always held a conversion (o). In the present case, therefore, upon the sale of the lease by the defendant, the plaintiffs might have brought an action of trover against the defendant, and it makes no difference, as it appears to us, that *Stevens* concurred in or directed the sale, for, upon the events that have since happened, *Stevens* must be considered to have been a perfect stranger, acting without any authority in law, and liable to have been joined in the action with the present defendant.

If then the assignees might have maintained an action of trover, they may, according to a well known class of cases, waive the *tort* and bring an action for money had and received; such waiver being a benefit to the defendant, as it limits the damages to the amount of the proceeds of the tortious sale. This disposes of the two first sums mentioned in the case, which were received as part of the proceeds of the sale of the lease. As to the remaining sums, two of which appear to be rent for the bankrupt's houses, which were received by the hands of the defendant; and the third, a sum of money due to the bankrupt upon an agreement relating to a party-wall, which also was received by the defendant from the party who owed it to the bankrupt; those sums appear to be strictly and literally money received by the defendant to the use of the assignees after the act of bankruptcy committed, and notice of such act. And we can see no alteration in the law of the case, because *Stevens* assented to such payments being made; for *Stevens* was not assignee *de jure*, but a mere stranger in interest, without any authority whatever to give his consent. Upon the whole, therefore, we think judgment must be given for the plaintiffs for the several sums mentioned in the case.

Judgment for the Plaintiffs.

(o) See Cro. Jac. 148; Yelv. 194.

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SLANDER. The *declaration* stated, that before and at the time of the committing of the grievances thereafter mentioned, the plaintiff had been and still was a draper, haberdasher, and laceman, and had always exercised and carried on, and still did exercise and carry on the said trade, with integrity, honesty, and propriety of conduct; that plaintiff had not been, nor until the time of the committing of the several grievances thereafter mentioned, had been suspected to have been in embarrassed or insolvent circumstances in the way of his trade or business, or imprisoned, or a person unfit to be credited in the way of his said trade or business as thereafter stated to have been charged upon and imputed to him by the defendant, or guilty of any offences or misconduct whatever; by means of which said premises the plaintiff, before the committing of the several grievances by the defendant as thereafter mentioned, had deservedly obtained the good opinion and credit of all his neighbours, and other subjects of this realm, to whom he was in anywise known, and had also thereby acquired, and was then thereby daily and honestly acquiring great gains and profits in his said trade and business, to the comfortable support of himself and his family, and the great increase of his riches; yet the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and maliciously intending to injure the plaintiff in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbours and other subjects of this realm, and to cause it to be suspected and believed by his the plaintiff's neighbours and other subjects of this realm, that the plaintiff had been in embarrassed circumstances in the way of his trade and business, and a person unfit to be credited in the way of his said trade and business, and to vex, harass, impoverish, and wholly ruin the plaintiff in his said trade and business, heretofore, to wit, on, &c., in a certain discourse which the defendant then had of and concerning the plaintiff, and of and concerning him in the way of his said trade and business, in the presence and hearing of divers subjects of this realm, then, in the presence and hearing of the said subjects, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in the way of his trade and business, the false, scandalous, malicious, and defamatory words following: that is to say, "I do not do business with him" (meaning the said plaintiff in the way of his trade and business), "nor will I, as he is a queer character, and has been deeply involved in debt, and in several prisons;" thereby meaning, and being by the last-mentioned subjects then understood to mean to insinuate that the plaintiff had been in embarrassed circumstances, and was unfit to be credited in the way of his said trade and business.

The second count was to the same effect as the foregoing, except that it alleged that special damage had been sustained by the defendant, through the refusal of several persons, who were named, to deal with him.

Pleas.—First, Not guilty; Second, That before and at the time of speaking and publishing the said several words, and each of them, in the declaration mentioned, the defendant was a linen merchant, and the trade and business of a linen merchant during all that time exercised and carried on; that one *John Wreford* was also theretofore, and during all the time before

In an action for slander, the declaration alleged that the defendant falsely and maliciously spoke certain words insinuating that the plaintiff was in embarrassed circumstances, and unfit to be trusted in his business. The plea justified the speaking of the words in a communication made by the defendant to a tradesman who made inquiries of him in the way of his trade, respecting the state of the plaintiff's affairs, and it was alleged that the defendant believed the statement to be true.—*Held*, on special demurrer, that the plea was insufficient, because it neither expressly denied malice, nor stated the publication to have been made honestly and *bona fide*, which might have amounted to an implied denial of malice.

A plea in bar which merely denies that the plaintiff has sustained special damage, is bad, where the words are actionable in themselves.

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mentioned, a hosier and haberdasher, and the trade and business of a hosier and haberdasher during all that time exercised and carried on; that the said *J. Wreford* being then desirous of inquiring and learning, and having occasion to inquire and learn, in the way of his trade and business of a hosier and haberdasher aforesaid, into the solvency and state of affairs of the plaintiff, and believing that the defendant could then afford him, the said *J. Wreford*, information as to such solvency and state of affairs, did then, to wit, on, &c. send one *W. Wreford*, the nephew of the said *J. Wreford*, and his agent for that purpose, to inquire into, and learn from the defendant, the solvency and state of affairs of the plaintiff; and thereupon the defendant being inquired of as to the solvency and state of affairs of the plaintiff by the said *W. Wreford*, as such agent as aforesaid of the said *J. Wreford*, in the way of his said trade and business so carried on by the said *J. Wreford*, did, in answer to such inquiry, speak and publish to the said *W. Wreford*, as such agent, the said several words in the declaration mentioned, as he lawfully might for the cause aforesaid, the same then being a confidential communication by the defendant to the said *W. Wreford*, as such agent, he, the defendant, at the time of so speaking and publishing the said words as aforesaid, firmly believing the same, and each of them, to be true. Conclusion with a *verification*.

The third plea denied the special damage alleged in the second count of the declaration.

Demurrer to the second and third pleas: as to the second, the cause assigned was, that the matters pleaded were in bar, if the words were spoken maliciously; and that, therefore, the plea, if it admitted malice, was bad; and if it denied the malice, was argumentative, and amounted to the general issue; and, being a denial, should have concluded to the country; that the plea did not sufficiently deny the grievances, or confess and avoid them; that the matters pleaded did not avoid the malice; that the plea would take away from the jury the consideration of the question of malice, although the malice was either the gist, or at least a substantive part of the cause of action; that the plea amounted to the plea of not guilty: that it did not confess the meaning with which the words were charged in the declaration to have been spoken; that the plea, although it professed to answer the whole declaration, only justified a speaking and publishing to one person, although the defendant was charged with speaking and publishing the words in the presence and hearing of divers; that the plea shewed no reason or necessity for publishing the words in the presence of divers, when the occasion, as stated in the plea, only required the defendant to speak the words to one person alone; that the plea ought to have shewn some reason why the defendant should believe the words to be true; and also that it ought to have shewn what occasion *J. Wreford* had to inquire into the solvency and state of affairs of the plaintiff, that the Court might see whether it was a lawful occasion; and that, at all events, the plea ought to have stated the occasion to have been lawful or proper, and that the defendant had notice of it; that the plea was substantially bad, because a party who does not appear by the plea to be the relation or friend, or to have any connexion with the person who applies to him, or to have had any grounds for his belief, is not justified in making false assertions injurious to a tradesman's credit; and that the plea was in other respects informal, uncertain, and insufficient.

And as to the third plea, that the special damage was not the gist of the action, nor traversable.

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Talford, Serjt., in support of the demurrer.—The declaration charges the defendant with speaking the defamatory words “in the presence and hearing of divers subjects of this realm,” and the defendant justifies the speaking of the words in the course of a confidential communication to one person. But a defendant who may be justified in making a confidential communication to one person, is not therefore justified in making such a communication to several persons.—[*Tindal*, C. J.—Suppose the same words were spoken on two occasions, may not the defendant justify the speaking upon one of those occasions, if he could not justify as to both?—The objection is, that one kind of communication is charged, and another kind is justified; the plea is, upon this ground, insufficient. Secondly, There is no denial of speaking the words maliciously; it is not denied expressly or impliedly; the declaration charges that the defendant spoke the words maliciously; and a person may maliciously utter slanderous matter, though true. In *M^rPherson v. Daniels* (a), which was an action for slander, *Littledale*, J., says, “The declaration, which contains a technical statement of the facts necessary to support the action, alleges that the defendant falsely and maliciously published the slander to the plaintiff’s damage. In order to maintain such an action, there must be malice in the defendant and a damage to the plaintiff, and the words must be untrue. Where words falsely and maliciously spoken, as in this case, are actionable in themselves, the law *primâ facie* presumes a consequent damage without proof, in other cases, actual damage must be proved to constitute a good defence; therefore, to such an action, where the publication of slander is not intended to be denied, the defendant must negative the charge of malice (which, in its legal sense, denotes a wrongful act done intentionally without any just cause or excuse), or shew that the plaintiff is not entitled to recover damages. It is competent to a defendant, upon the general issue, to shew that the words were not spoken maliciously; by proving, that they were spoken on an occasion, or under circumstances which the law, on grounds of public policy, allows, as in the course of a parliamentary or judicial proceeding, or in giving the character of a servant. But if the defendant relies upon the truth as an answer to the action, he must plead that matter specially; because the truth is an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment), but because it shews that the plaintiff is not entitled to recover damages (a).” The third plea cannot be supported. The slanderous words are actionable without proof of special damage, and the special damage is a mere consequence which can only go to increase the amount of damages.

Storks, Serjt., *contrâ*.—The words spoken are slanderous of themselves,

(a) Another objection was taken, namely, that the plea amounted to the general issue, and the following authorities were cited:—*M^rPherson v. Daniels*, 10 B. & Cres. 272; *Smith v. Spooner*, 3 Taunt. 246; Com. Dig.

tit. “Pleader,” E. 14.; *Carr v. Hinckley*, 4 B. & C. 547, and Reg. Hil. T. 4 Wm. 4, tit. “In Case.” The Court gave no judgment on this point.

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and they need not have been averred to be spoken maliciously, *Drew v. Coulton* (b). In *Bromage v. Prosser* (c), it is said, "In an ordinary action for words, it is sufficient to charge that the defendant spoke them falsely, it is not necessary to state that they were spoken maliciously. This is so laid down in *Styles*, 392, and was adjudged upon error, in *Mercer v. Sparks* (d). The objection there was, that the words were not charged to have been spoken maliciously, but the Court answered, that the words were themselves malicious and slanderous; and, therefore, the judgment was affirmed." If, therefore, the words had not been stated to be spoken maliciously, the argument on the other side would not apply, *Monprivatt v. Smith* (e); *Taylor v. Cole* (f). As to the third plea, it cannot be contended that the special damage is the gist of the action.—[*Tindal*, C. J.—And yet it is pleaded in bar of the action; there is no such thing as such a plea.]

Talfourd, in reply.—It is said that the words laid in the declaration need not be stated to have been spoken maliciously. Some of the old authorities may seem to support that proposition; but when *Mercer v. Sparks* (g) was cited in *M'Pherson v. Daniel* (h), *Parke*, J., observed, "That was after verdict, and malice must have been proved at the trial." And the same learned judge remarks, in giving his judgment, "It does not state that *Woor* falsely and maliciously spoke the words; and though malice may be implied from words actionable of themselves, still the defendant ought to have stated in the plea, as he must have done in a declaration against *Woor*, that the words spoken by *Woor* were false and malicious." But the main objection to the plea is, that it does not negative malice. It does not even allege that the words were spoken honestly and *bonâ fide*, *Pitt v. Donovan* (i). The charge of malice is neither confessed or avoided.

Cur. adv. vult.

N^o. 25th.

TINDAL, C. J.—The argument in this case has turned principally on the special demurrer to the second plea. For, as to the third plea, which is pleaded, not to the action, but to the special damage only, we held it to be insufficient, as the argument was proceeding before us. The allegation of special damage in a declaration of slander is intended only as notice to the defendant, in order to prevent his being taken by surprise at the trial. Where the words are actionable in themselves it is not the gist of the action, but a consequence only of the right of action. If the plaintiff proves his special damage, he may recover it; if he fails in proving it, he may still resort to and recover his general damages. A traverse, therefore, of such an allegation is immaterial and improper, as a finding upon it either way will have no effect as to the right to the verdict. With respect to the second plea, it avers in substance, that the words complained of in the declaration, were spoken in the course of a confidential communication, between the defendant and a person who had made inquiries respecting the solvency and

(b) Note to *Harman v. Tappenden*, 1 East, 563.

(c) 4 B. & C. 247.

(d) Owen, 51; Noy, 35.

(e) 2 Camp. 175.

(f) 3 T. R. 392

(g) Owen, 51.

(h) 10 B. & C. 266.

(i) 1 M. & S. 639.

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state of affairs of the plaintiff, whom the inquirer was then about to trust in the course of his trade and business; and it further avers, that at the time of his speaking the words in question, he, the defendant, firmly believed the same and each of them to be true. To this plea the plaintiff has demurred, and has assigned several causes of special demurrer. The two points, however, which have been relied on in argument before us are these: first, That the plea amounts to the general issue, and is, on that account, bad; and secondly, That the defendant has not, by the allegations in his plea, sufficiently negatived that the speaking of the words was accompanied with malice in fact, so as to constitute a legal answer to the action.

It is unnecessary to give any opinion on the first objection, because, upon the ground of the second, we think the plea is insufficient in law. The ground of defence intended to be set up by the defendant is, that the words were spoken on an occasion in which the exigences of society demand that there should be the unlimited right to make inquiry on the one hand, and the unlimited freedom to communicate on the other, such communication being made without any malice against the plaintiff. There can be no doubt that where such an occasion occurs, and there is, in the making of the communication, the absence of express malice, or malice in fact, the law holds the communication to be innocent, and to give no right of action to the plaintiff. In order, however, to constitute such a defence in any case, both circumstances must be found to concur: and after the just occasion for the communication has appeared in proof, the issue must depend on the existence or absence of express malice against the plaintiff. The question, therefore, upon the present plea is, whether it states with sufficient certainty both the circumstances above mentioned. So far as relates to the occasion of publishing the libel, the statement in the plea appears to us to be free from any sound objection. The publication is alleged to have taken place in the course of a confidential communication between one tradesman and another, as to the solvency of a third person, whom the inquirer was about to trust. If such communications are not protected by the law from the danger of vexatious litigation, in cases where they turn out to be incorrect in fact, the stability of men engaged in trade and commerce would be exposed to the greatest hazard, for no man would answer an inquiry as to the solvency of another. But then comes the question as to the other fact, which is essential to complete the defence; was the communication made without any malice against the plaintiff? And we think the plea is defective in respect to its allegation on this point. The plea neither expressly denies malice, nor states the publication to have been made honestly or *bonâ fide*, which might have amounted to an implied denial of malice. All that it alleges is, that the defendant firmly believed the words spoken to be true. Now, this is the denial of one ground upon which malice in fact might be presumed against the plaintiff, but of one only. If the plaintiff could shew that the defendant had uttered the words, and had not believed them to be true at the time he uttered them, it would undoubtedly be conclusive evidence of the defendant's malice against the plaintiff. The allegation, therefore, in the plea, that the defendant did believe the words to be true, negatives undoubtedly that single ground of malice, but no more. The communication, however, may have been malicious on various other grounds. Direct malice against the plaintiff may have gone far in

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producing the defendant's belief. Consistently with the allegation in his plea, the defendant may have sought out the occasion of hearing the slander of the plaintiff, and again the subsequent occasion of making the communication. These, and other grounds of a malicious speaking of the words, would be excluded by an express denial of malice, or the allegation that the words were spoken honestly and *bonâ fide*. But we think the absence of malice in fact against the plaintiff does not appear with sufficient certainty upon the face of this plea; and for want of the express or implied denial of it, we hold the plea to be bad, and that there must be judgment for the plaintiff on the second and third pleas.

Judgment for the plaintiff.

Nov. 24th.

MASON, Demandant, SADLER, Tenant.

Where the demandant in a writ of right had neglected to proceed to trial, the Court granted judgment as in case of a nonsuit, leaving the demandant to his remedy by error, if the Statute 14 Geo. 2, c. 17, did not apply to writs of right.

CHANNELL had obtained a rule *nisi* for judgment as in case of a nonsuit. The grand assize was sworn in 1834; notice of trial was afterwards given for the *Guildford* Summer Assizes, 1835, but the demandant did not proceed to try the cause.

S. B. Harrison shewed cause.—The affidavits disclose that the delay was occasioned by a mistake in the proceedings. But there is great doubt whether the Stat. 14 Geo. 2, c. 17, applies to writs of right; the words used are "plaintiff" and "defendant," and when the question came before the Court in *Dennan v Bull* (a), they expressed no opinion upon the point; and in *Newman v. Goodman* (b) the Court doubted if the Statute did apply.

Channell cited *Almgill v. Pierson* (c), where judgment as in case of a nonsuit was entered up on a writ of right. He also stated that the parties would be delayed until the Summer Assizes, 1836, if the rule was not made absolute.

TINDAL, C. J.—It is by no means clear that the Statute applies to real actions. But as the objection will appear upon the record, this rule must be made absolute, and the demandant can sue out a writ of error if he thinks the Statute does not apply.

Rule absolute.

(a) 3 Bing. 499.

(b) 2 W. Black. 1093.

(c) 1 Bos. & P. 103

June 12th.

PEARCE v. VINCENT and an'.

Devise of freehold estates to T. Pearce, the testator's

cousin, for the term of his life, with a power to lease for seven years, and subject to the said estate for life, the testator devised the same to such of his, the testator's, relations of the name of Pearce, being a male, as the said T. Pearce should appoint or adopt, and in default of such appointment or adoption, then "unto the next and nearest relation or nearest of kin of the testator of the name of Pearce, being a male, who should be living at the testator's decease, his heirs and assigns for ever;" the said T. Pearce, who was the nearest relation of the testator of the name of Pearce, died without making any appointment or adoption in pursuance of the directions contained in the will.

Held, that T. Pearce took an estate in fee under the ultimate limitation.

BY order of the Master of the Rolls, the following case was submitted for the opinion of this Court:—*Richard Pearce*, the testator in this cause, by will,

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dated the 30th of *March*, 1813, gave, devised, and bequeathed his freehold and copyhold estates at *Westminster* and *Rushden*, unto his cousin, *Thomas Pearce*, his heirs and assigns, upon trust to sell and dispose of the same, and apply the money arising from such sale in payment of debts and legacies in aid of his personal estate; and gave the surplus of such purchase-moneys, if any, unto his said cousin, *T. Pearce*, his executors, administrators, and assigns, to and for his and their own use and benefit; and the testator devised to *Mary Heygate*, during her natural life, one clear yearly annuity of 200*l.*, to be issuing and payable out of all and every his freehold and copyhold estates not thereinbefore by him devised to his said cousin, *T. Pearce*, and subject to the payment of the said annuity; and also under and subject to the directions, payments, powers, provisos, conditions and declarations therein-after expressed and contained concerning the same, the testator gave, devised, and bequeathed his manors in the counties of *Hertford* and *Northampton*, and also all and every his lands, real estates, and hereditaments, both freehold and copyhold, situate and being in the several counties of *Hertford*, *Leicester*, and *Northampton* (except the *Westminster* and *Rushden* estates before devised, and the advowson of the church or rectory of *Husband's Bosworth*, and the presentation thereto), or elsewhere the same might be situated, unto his said cousin, *T. Pearce*, and his assigns, for and during the term of his life. And the testator gave, devised and bequeathed all his said manors and his said advowson of *Husband's Bosworth* aforesaid, with its appurtenances, and all his lands and hereditaments situate in the said counties of *Hertford*, *Leicester*, and *Northampton*, and elsewhere, with their appurtenances, and all his stocks, funds, and securities for money, and all and singular other his real and personal estate (save and except as thereafter, or by any codicil to be added to his said will, was specially bequeathed or mentioned), and also all his copyhold lands and hereditaments situate in the said several counties or wheresoever else the same might be situate (except the *Westminster* and *Rushden* estates thereinbefore devised), subject, nevertheless, to the life estate thereinbefore given to his said cousin, *T. Pearce*, of and in the said manors and manorial rights, lands, hereditaments, freehold and copyhold estates, and to the payment of the said annuity of 200*l.* to the uses, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisos, conditions, declarations, and agreements thereafter mentioned, expressed, and declared, and hereinafter stated. And in case such person as thereafter was mentioned, as the testator's cousin, *T. Pearce*, should approve of or adopt, should be under the age of twenty-one years at the decease of the testator's cousin, *T. Pearce*, the testator gave an annual sum of 200*l.* to be applied for and towards the maintenance and education of any person being a male relation of the testator, of the name of *Pearce*, whom the said *T. Pearce* should approve of and adopt, and should signify the same in writing under his hand, which the testator did thereby authorize and direct the said *T. Pearce* to do as soon after the testator's decease as he could conveniently, from the time of his said cousin *T. Pearce's* decease, until such person should have attained the age of twenty-one years. And from and after the decease of the testator's cousin, *Thomas Pearce*, the testator devised all and singular the said premises, as well his real estate as personal, and all accumulations thereof, to such of the testator's relations of the name of *Pearce* (being a male), as his cousin *T. Pearce* should, by any

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deed or writing signed by him, in the presence of two subscribing witnesses, or by his last will and testament in writing, by him to be executed in the presence of three or more credible witnesses, give, devise, or bequeath, or nominate, or appoint the same to; and in default of any such gift, devise, bequest, or nomination, or appointment by the testator's cousin, *T. Pearce*, to, or in favour of any such male relation of the testator, of the name of *Pearce*, as aforesaid, then the testator devised the said estates and premises to such of the testator's relations of the name of *Pearce*, being a male, as the said *T. Pearce* should approve of or adopt for the purposes of education, as aforesaid, if he should be living at the time of the decease of the testator's cousin, *T. Pearce*, and his heirs, executors, administrators, and assigns for ever: and in case the testator's cousin, *T. Pearce*, should not have approved or adopted any such male relations of the testator, as aforesaid, or in case he should have made such approval or adoption of any such male relation of the testator, and there should not be any such male relation living at the time of the decease of the testator's cousin, *T. Pearce*, then the testator devised the said estates and premises *unto the next and nearest relation or nearest of kin of the testator of the name of Pearce, being a male, or the elder of such male relations, in case there should be more than one of equal degree, who should be living at the testator's decease, his heirs, executors, administrators, and assigns for ever*; and as to the testator's advowson or rectory of *Husband's Bosworth*, the testator gave the first and next presentation to the same rectory, which should happen after his decease, unto certain persons therein mentioned in succession; and in case none of them should choose to present themselves, or declare their intention of so doing by the time allowed them, as therein mentioned, or should refuse the same, such refusal to be declared as therein mentioned, then the testator directed that the presentation to his rectory or living of *Husband's Bosworth*, should at all times go and belong to his cousin *T. Pearce*, whenever the said rectory should become vacant, to present to at all times during the life of the said *T. Pearce*. The testator gave all his plate, books, and pictures, household goods, bed, bedding, linen, and household furniture at *Husband's Bosworth and Stanwick*, in his will mentioned, or elsewhere, to his executors, in trust to permit and suffer his cousin, *T. Pearce*, to have, use and enjoy the same during his life, and after his decease then in trust for the person who should succeed to or inherit the testator's real estates under and by virtue of his will. And the testator declared his mind and will to be, and he did thereby order and direct his cousin, *T. Pearce*, to pay and apply so much of the rents and profits of the said estates so given, devised, and bequeathed by the testator, to him for his life as aforesaid, not exceeding the annual sum of 200*l.*, as he in his judgment and discretion should think proper, for and towards the maintenance and education of such person, being a male relation of the testator, of the name of *Pearce*, whom his cousin should approve of and adopt in manner aforesaid, in case such male relation should, at the time of his adoption by the testator's cousin, be a minor under age, until such person should have attained his age of twenty-one years; and to lay out and invest the residue of the said annual sum of 200*l.* (not expended in such maintenance and education) at interest, to accumulate in the name of the testator's cousin, *T. Pearce*, in some of the public funds, or upon government or real securities, during the minority of such male relation of the name of *Pearce*: and the testator

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declared and directed that his cousin *T. Pearce*, his executors and administrators, should stand seised of such accumulations, in trust for the benefit of such male relation of the name of *Pearce*, and the same with the dividends and interest, as should be assigned to him at such times and in such proportions after he should have attained his age of twenty-one years, as the testator's cousin, *T. Pearce*, his executors or administrators, should think most to his advantage; and in case of his death before attaining twenty-one years of age, then in trust for the benefit of such male relation of the testator of the name of *Pearce* as should, upon the decease of the testator's cousin, become entitled to the testator's estates by virtue of his will: and in case such male relation of the testator, of the name of *Pearce*, so approved of and adopted by his cousin, *T. Pearce*, as aforesaid, should, in the life-time of his cousin, attain twenty-one years of age, then the testator willed and directed his cousin, during his life, to pay and allow out of the rents and profits of the estates so devised to him for his life as aforesaid, unto such male relation, from the time of his attaining the age of twenty-one years, the whole of the annual sum of 200*l*: Provided also, and the testator declared, that it should be lawful for, and he did thereby authorize and empower his said cousin to demise or lease all or any part of his said manors, farms, lands and tenements, for any term or number of years not exceeding seven years, to take effect in possession, and at the best and most improved annual rent presently payable, and without taking any fine or premium, as therein mentioned.

The testator died on the 3d of *January*, 1814, without leaving any issue, and without having revoked or altered his said will.

Thomas Pearce, the tenant for life named in the will, died without issue, and never did in any manner execute the power of adoption or selection of a relation of the testator, under or according to the will. The next or nearest relations or nearest of kin of the testator, living at his decease, of the name of *Pearce*, being males, were his three first cousins, *viz.* first, the said *Thomas Pearce*, the tenant for life, who was the son of *Robert Pearce*, deceased, which *Robert Pearce* was born in 1711, and was an uncle of the said *Robert Pearce*, the testator; secondly, *Richard Pearce*, the plaintiff in this suit, who was the son of the testator's uncle, *William Pearce*, which *William Pearce* was born in 1715; and thirdly, *William Pearce*, the younger, brother of the said plaintiff. The aforesaid three cousins were, at the time of the decease of the testator, of the respective ages following:—*Thomas Pearce*, sixty-seven years; *Richard Pearce*, the plaintiff, sixty-six years; and his brother *William Pearce*, fifty-nine years. The questions for the opinion of the Court were, first, whether, under the circumstances stated, *Thomas Pearce* took any and what estate under the ultimate limitations contained in the will of the testator; secondly, whether, under the circumstances stated, the plaintiff, *Richard Pearce*, took any and what estate under the ultimate limitations contained in the will (a).

Wright, for the plaintiffs.—*Thomas Pearce* took only a life estate under

(a) This case was sent to the *Exchequer* by Sir John Leach, M. R. (Reported 1 Cr. & M. 598), and the Barons sent in a certificate to the effect, that *Thomas Pearce* took an estate in fee. When the case came

back to be heard on the certificate (see 2 M. & K. 800.) Sir John Leach, being desirous that the case should receive further consideration, sent it to this Court.

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the will, and *Richard Pearce* took an ultimate estate in fee. But it is sufficient to inquire, for the purposes of the present argument, whether *Thomas* took in fee, or only for life. Now it was the manifest intention of the testator to give his estates for as long a period as he could direct them to one of his family of the name of *Pearce*. It was not his intention to provide for any one who was living at the time he made his will, but he directed *Thomas*, the tenant for life, to adopt a male relation of the name of *Pearce*. He limits the power of granting leases by *Thomas Pearce* to seven years, which shews his anxiety to keep the estate free for the ultimate taker. How then can it be contended that it was the testator's intention to give *Thomas Pearce* an estate in fee? for he might have sold the estate immediately after the death of the testator, and then all his precaution to give the estates to a male relation of the name of *Pearce* would be frustrated. *Holloway v. Holloway* (b) will be relied on; but in that case there was no intention to be collected, that the property should remain vested in the same name, nor was there any power of appointment in that will. In all cases where there is a tenancy for life given, with a power of appointment, that is sufficient to shew that the intention of the testator was to give only an estate for life. The certificate given by the Barons of the *Exchequer* will be referred to on the other side, but that certificate did not meet with the approbation of Sir *John Leach*, M. R., who expressed himself to the following effect, when it came before him (c):—"The opinion of the judges of the Court of *Exchequer* may be capable of being supported by some strict technical rule of law, which it would be difficult to reconcile to a plain understanding, though I am not at present aware that there is any such rule of law. If *Thomas Pearce* is to take under this gift, he must take because it appears from the will to have been the intention of the testator that, in the events which have happened, he should take. This is not the case of an heir at law, who cannot be excluded unless there is an expressed intention to exclude him, but we must here find an intention on the part of the testator that *Thomas Pearce* should take. Now, what is this will? The testator gives to *Thomas Pearce* an estate for life, with the power of appointing to an estate in fee, after his death, some person who should fill the character of a male relation of the testator, bearing the name of *Pearce*. This power of appointment, therefore, is so limited, according to the expressed intention of the testator, that the donee of the power can appoint the fee to no person except to a male relation of the testator of the name of *Pearce*, and the testator gives the fee, in case no such appointment should be made, to such male relation of the name of *Pearce* as should be in the nearest degree, and if there were several relations in equal degree, then to the eldest of such relations living at his death. It is said that *Thomas Pearce* was the nearest male relation of the testator living at his death, and that, therefore, the testator must have intended that *Thomas Pearce*, to whom he had given an estate for life with a limited power of appointment in fee, should be the person, in the events which have happened, entitled to take under this description. What would be the effect of such a construction? Why, that the power of appointment should not be limited

(b) 5 Vesey, 399.

(c) This judgment was read from shorthand writers' notes; it has since been re-

ported in 2 M. & K. 800; the above extract is taken from that report.

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to a male relation of the testator of the name of *Pearce*, but that the estates might be given to a mere stranger. Is there then to be found in this will a clearly expressed intention on the part of the testator that the remainder should extend to *Thomas Pearce*; or would not any man of plain understanding say, that it is the clear intention of the testator that *Thomas Pearce* should not take under this limitation? It is quite inconsistent with the limited power given to *Thomas Pearce* of appointing to a male relation of the name of *Pearce*, that the testator should have intended to include *Thomas Pearce* in the description contained in the ultimate limitation, and thereby give him the power of defeating the object of the appointment. It is my duty, therefore, to submit this case to further investigation, and the only question is, in what manner it is to be further investigated. After the decision to which the Court of *Exchequer* has come, I cannot again send the case to that Court, and I rather regret having sent it at all; but having once sent the case to a court of law, I shall direct a second case to be sent to the Court of *Common Pleas*." It is therefore apparent that the Master of the Rolls was dissatisfied with the decision in the Court of *Exchequer*, and the argument there advanced for the plaintiff, that the Court would introduce words into the will, to exclude *Thomas Pearce*, was not the most favourable mode of supporting the plaintiff's case (*d*), for it was not to be expected that the Court would make a will for the testator. In *Briden v. Hewlett* (*e*), where it was contended that the mother of a testator took, as next of kin, Sir *John Leach*, M. R., says, "It is impossible to contend that this testator meant to give the property in question absolutely and entirely to his mother, because he gives it to her for life, with a power of appointment." In *Bird v. Wood* (*f*), certain stock was devised to trustees, upon trust to pay the interest and dividends thereof unto the testatrix's daughter *Mary* during her life, and after the death of her daughter, to transfer the stock and pay the interest to such person as her daughter should appoint, and, in default of appointment, upon trust to transfer the stock and pay the interest unto the testatrix's own next of kin, according to the Statute of Distributions, to be considered as a vested interest from the time of the testatrix's death. The testatrix's daughter died without ever having a child, and without having executed the power of appointment, and Sir *John Leach*, then Vice-Chancellor, held; "That the persons who, at the testatrix's death, would have been her next of kin, if her daughter had been then dead without children, were plainly intended there." A class of cases will be referred to on the other side, but they can only be valuable when the intention of the testator is not apparent, as is remarked by *Lawrence, J.*, in speaking of the construction of a will, in *Leigh v. Leigh* (*g*), "That depends on whether the plaintiff comes within the meaning of the words, as they have been used by the testator; and though it be true, that, if that meaning be ascertained, no reasoning from supposed cases can induce the Court to put a different construction upon the will, but can only lead to a conclusion that the testator did not see all the consequences of the disposition he may have made; yet, in endeavouring to ascertain the meaning of the testator, the absurdities, improbabilities, and inconsistencies which may arise out of cases falling within one construction or

(*d*) *Vide Pearce v. Vincent*, 1 Cr. & M. 598.

(*e*) 2 M. & Keene, 90.

(*f*) 2 Sim. & Stuart, 400.

(*g*) 15 Vesey, 92.

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another, have constantly been attended to, with a view of ascertaining such meaning." But the intention of the testator is here so plainly expressed that *Thomas Pearce* shall only take an estate for life, that the Court will not be disposed, by an ingenious argument on decided cases, to defeat that intention. After the devise of the estates to *Thomas Pearce* for life, he is allowed to present to certain advowsons "at all times during the life of the said *Thomas Pearce*." The plate and furniture is also given to him only for his life. When the testator uses the words "next and nearest relation of the name of *Pearce*," it must be taken that as *Thomas*, who was the nearest relation, was already provided for, he must be passed over, and the next relation be entitled to take in fee. The word "next" must be taken to shew the short, definite, and particular meaning of the testator, because he has already sufficiently provided for the nearest relation. The whole will manifests that *Thomas Pearce* should take only an estate for life; if he had a male child he could avail himself of the power of appointment contained in the will, and if he had not, then he could in the same manner appoint in favor of a male relative of the name of *Pearce*; but beyond that *Thomas* was clearly not the object of the testator's bounty.

Preston, contrâ.—*Thomas Pearce* was the eldest nearest of kin of the testator at the time of his death. One of the leading principles of construction is, "*Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.*" It cannot be contended that the testator does not expressly refer to his nearest relation, living at the time of his death. In *Holloway v. Holloway (h)* the rule is laid down by Sir *P. Arden*, M. R. "The only question is, whether upon the true construction of this codicil it must necessarily be intended he did not mean by these words what the law *primâ facie* would, strictly speaking, intend heirs at law at the time of his death. A testator certainly may, by words properly adapted, shew that by such words *persona designata*, answering a given character at a given time is intended. But, *primâ facie*, these words must be understood in their legal sense, unless by the context or by express words they plainly appear to be intended otherwise." It is said, that if an estate for life is given with a power of appointment, that this necessarily excludes the tenant for life. But the decided cases are the other way, *Harrington v. Harte (i)*; *Jones v. Colbeck (j)*; *Cholmondeley v. Clinton (k)*; *Doe d. Garner v. Lawson (l)*; *Doe d. Cholmondeley v. Maxey (m)*; *Rayner v. Mowbray (n)*. *Bird v. Wood (o)*, which has been relied on, is an authority for the defendants, and it was referred to by Sir *J. Leach*, M. R. in a recent case, *Elnsley v. Young (p)*. The case last cited is also of great importance to shew the opinion of Sir *J. Leach*, which has been so much relied upon. The marginal note is, "Where on the failure of a particular gift to one for life, with remainders over, the next limitation in the deed was to the settlor, or such person as he should appoint, and in default of appointment to such person or persons as should at the time of his death be his next of kin; and the settlor died before the

(h) 5 Vesey, jun. 400.
(i) 1 Cox, 131.
(j) 8 Vesey, jun. 38.
(k) 2 Jac. & W. 1.
(l) 3 East, 278.

(m) 12 East, 589.
(n) 3 Brown's C. C. 234.
(o) 2 Sim. & Stuart, 400.
(p) 3 M. & Keene, 82.

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tenant for life, without having made any appointment, the tenant for life, who was one of the settler's next of kin, was held not to be excluded from the benefit annexed to that character." Now, here is an estate for life: a power of appointment, and a trust for the next of kin, and yet the tenant for life was held not to be excluded. This case has since been argued upon appeal before the Lords Commissioners, and the opinion given by Sir *J. Leach* upon this part of the case was confirmed (g), although upon another point it was reversed. Sir *J. Leach* uses the following strong language in giving his judgment: "Upon the other point, my present opinion is, that if there be a gift to a tenant for life, with remainder to his children, remainder, if he have no children, to the next of kin at the testator's death, and the tenant for life happen to be one of those next of kin, he is not excluded from taking in that character. The mere circumstance of a partial interest being given to a particular person does not exclude such person from the benefit of a larger or other interest given to him under another description (r)."

Wright, in reply.—To effectuate the intention of a testator, the Courts will read words of limitation as words of purchase; or they will exclude words. This is a case where the will is to be regarded, as to the person who is to take, and not as to the period when the distribution is to take place. The cases cited relate to the latter point, upon which no question arises. The case of *Holloway v. Holloway* (s) has been questioned; and in *Elmsley v. Young* (t), Sir *John Leach*, M. R., was of opinion that it was a questionable case. *Cholmonley v. Clinton* (u), like the other cases, refers only to the time of taking, and does not furnish any principle to rule this case. This is a question of intention. In *Andrew v. Southouse* (v) Lord *Kenyon*, C. J., says, "For nearly half a century it has been the wish of the Courts to give effect to the intention of the deviser as far as they can." In *Roe v. Pattison* (w) Lord *Ellenborough*, C. J., remarks, "Indeed there are no words of such an inflexible nature as will not bend to the intention of a testator, when it can be collected from the context of his will. Accordingly we have lately decided that the real estate passed under a devise of the personal estate, because it was clear that such was the intention of the testator." In *Jesson v. Wright* (x) Lord *Redesdale* says, "The rule is, that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise." *Lane v. Earl of Stanhope* (y); *Robinson v. Robinson* (z). In the present case there cannot be any doubt but that it was the intention of the testator to give *Thomas Pearce* an estate for life only. His intention was to give the property to a relation of the name of *Pearce* whom *Thomas* might adopt, and who should survive *Thomas*; but if *Thomas* did not make that adoption, then the estates were

(g) The appeal came before Sir *L. Shadwell* and Mr. *J. Bosanquet*, and the following note of Sir *L. Shadwell's* judgment was read by Mr. *Preston*, "The first point appears both to me and my brother commissioner to be too clear to render any argument necessary."

(r) It was stated, in a pedigree attached to the case, that the testator had a brother named *Zachary*, who had not been heard of since 1795. The counsel for the parties

did not rely on this circumstance; it was mentioned that the testator had also a sister living when he made his will.

(s) 5 Vesey, 399.

(t) 2 M. & K. 86.

(u) 2 Jac. & W. 115.

(v) 5 T. R. 299.

(w) 16 East, 22.

(x) 2 Bligh, 57.

(y) 6 T. R. 345.

(z) 1 Burr. 38.

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to go to the nearest kinsman of the name of *Pearce*; clearly manifesting an intention to continue the estates for two generations in the male line of the name of *Pearce*.

The following certificate was sent by the Court during this term:—

" This case has been argued before us by counsel, and we have considered the same, and assuming *Zachary Pearce*, the testator's brother, to have died without issue in the testator's lifetime, we think, under the circumstances above stated, *Thomas Pearce* took an estate in fee under the ultimate limitation contained in the will of the testator. In consequence of our answer to the first question, it becomes unnecessary to answer the second.

" *N. C. Tindal.*

" *J. A. Park.*

" *S. Gaselee.*

" *J. Vaughan.*"

Nov. 23d.

Ex parte ANGLE.

A debtor in the *Fleet* prison was charged with felony by the Lord Mayor's warrant:—*Held*, that the warden was justified, under Reg. Hil. T. 3 Geo. 2, in placing him in the strong room of the prison for safe custody.

KELLY obtained a rule *nisi* calling upon the warden of the *Fleet* prison to shew cause why he should not release one *Angle* from the strong room of the prison. It appeared by the affidavits that *Angle*, being arrested for debt, had been taken to the *Fleet*, and that he associated with the other debtors until the 17th of *November*, when a warrant issued by the Lord Mayor of *London* was lodged at the prison. The warrant was directed to constables, and charged them to bring *Angle* before the Lord Mayor, to answer a charge of forgery which had been preferred against him. The warden thereupon consigned *Angle* to the strong room of the prison for safe custody, and the prisoner complained that he was kept a close prisoner, and that the room was exposed to the weather, and was damp and unwholesome. He also stated that he was desirous of meeting the charge which had been preferred against him, and that he had no intention to attempt to escape out of custody.

Wilde, Serjt., shewed cause upon affidavits which contradicted the statement made as to the state of the room. It also appeared that the warden had offered to release *Angle* from close confinement if he would give security to the amount of the debt for which he was in custody; that 3,000 persons passed in and out of the prison every day, and that the other prisoners would be unwilling to associate with a person charged with having committed a felony. In addition to these facts, it was submitted that *Angle* could sue out a writ of *habeas corpus*, and so dispose of the charge without delay.

Mr. *Cancellor*, one of the secondaries of the Court, whose duty it was to visit the *Fleet* prison, stated to the Court, that the strong room was not in the condition described by *Angle* in his affidavit, but that it was in a wholesome state.

Kelly and *Humfrey*, in support of the rule, referred to the rule of *Hil. T. 3 Geo. 2*, s. 7, which directed the warden " with all convenient speed to

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make and provide a confined room or dungeon in the wards, as it was before the great fire of *London*, for the confinement of persons endeavouring to make their escape, or guilty of any other misdemeanor, that the general quietness and liberty of the rest of their fellow prisoners may not be restrained or suffer thereby." In a subsequent part of the rule it was stated that "a confined room was provided according to the said last-mentioned order, and that the same is boarded, wholesome, and dry." They contended that the warden had no authority to confine any prisoner in the strong room unless he had brought himself within one of the cases contemplated by the terms of this rule. It was not shewn that *Angle* had endeavoured to escape, nor had he been found guilty of any misdemeanor, nor did the Lord Mayor's warrant empower the warden to keep him in close confinement. The offer to release him if he could give security for the amount of the debt for which he was detained, shewed that the warden was not acting under any authority contained in the warrant; and if the circumstance that a debtor had stronger motives to attempt an escape, would justify the warden in keeping him in close custody, then if a prisoner should be in custody for a very large sum of money, the warden would be enabled to separate such a debtor from the other prisoners, and to place him in confinement in the strong room. Such a power would be dangerous to the liberty of the subject; and as the warden is an officer of this court, the prisoner need not be put to the expense and delay of obtaining a writ of *habeas corpus*.

TINDAL, C. J.—I am not sorry this case has been brought before us, because it is the duty of the Court to interfere if more severity is practised than is necessary to keep a prisoner in safe custody. It appears to me, that the real question is, whether, with reference to the safe custody of this prisoner, and the comfort of other persons in custody, more has been done by the warden than was absolutely necessary. But looking at the affidavits, and having the certificate of our own officer, I am of opinion that no more has been done than the necessity of the case required. In the rule of *Hil. T. 3 Geo. 2*, the following appears upon the subject of the erection of the dungeon or strong room.—[The extracts were read, which have been already stated.]—Our officer has stated that the room is now "boarded, wholesome, and dry," and one question upon this rule is, whether the words "endeavouring to make their escape," mean that the warden is to wait until a prisoner actually makes an attempt to escape. Now the warden received a warrant from the Lord Mayor, which charged the prisoner with the commission of a very serious offence, and such a person stands in a very different situation from other persons, as to the motives which would induce him to attempt an escape. The rule goes on to say, "that the general quietness and liberty of the rest of their fellow prisoners may not be restrained or suffer thereby," and it may be asked, with reference to this part of it, whether the warden ought to allow this prisoner to remain in the same situation as the other persons within the prison, or whether he could do so with a due regard to their liberty, for it appears that two or three thousand persons pass in and out every day; it is also stated that the debtors would feel indignation and disgust if persons charged with felony were associated with them, and I am of opinion that these circumstances bring this case within the reason of the rule. It appears to me, also, that the warden put this case

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on its right footing when he offered to restore the prisoner to his former situation, provided he would give security to the amount of the debts for which he was in custody. The interference of the Court is the less needed because the prisoner may apply for a writ of *habeas corpus*, and bring the charge which is made to a speedy determination. It does not, therefore, seem to me that any unnecessary duress has been used, and this rule must be discharged.

PARK, J.—I am of opinion, and it is admitted, that no cruelty has been exercised by the warden. It is contended, that the prisoner has not been found guilty of any misdemeanor within the meaning of the rule *Hilary T. 3 Geo. 2*; but the words referred to do not apply to cases of a conviction before a jury, but to misdemeanors within the prison, which require the interference of the warden. The prisoner ought to have brought the prosecutor here on the discussion of this rule, if he had wished to make this application effectually, and he might have also taken steps to be brought before a magistrate. As to the construction of the rule, I think every case depends on its own peculiar circumstances, and I agree that the other prisoners would feel indignant if they were compelled to associate with persons charged with felony; and it is certified to us, that the room is not now in the state described in some of the affidavits.

GASELEE, J., concurred.

Rule discharged.

Nov. 19th.

YATES v. KNIGHT.

By an order of reference, an action and all matters in difference were referred to arbitration, the costs of the suit and of the reference to abide the event of the award. The arbitrator directed the defendant to deliver certain goods to the plaintiff, and the plaintiff to pay a sum of money to the defendant; that all proceedings in the action should cease, and a general release be given:—*Held*, that the award was not uncertain as to costs, as the effect of it was that each party should pay his own.

ASSUMPSIT for the price of flints sold and delivered by the plaintiff to the defendant. By a judge's order the action and all matters in difference between the parties were referred to arbitration; the terms being that the costs of the suit and the costs of the reference and award should abide the event of the award. The arbitrator, who was not a member of the legal profession, awarded that the defendant should deliver 744½ yards of flints to the plaintiff, and that the plaintiff should pay the defendant 59*l.*; that all proceedings in the action should cease, and that each party should, at the cost of the other, give a general release.

Busby obtained a rule *nisi* to set aside the award, upon the ground that it was uncertain with respect to the payment of costs, *Leeming v. Fearney (a)*.

Addison shewed cause.—The arbitrator has disposed of the question of costs; for, as the award now stands, each party must pay his own costs, as if a *stet processus* had been formally awarded. In *Jackson v. Yabsley (b)*, where all matters in difference were referred to arbitration, the costs of the suit to abide the event, it was held that an award that the plaintiff had no demand on the defendant on account of any alleged breaches of covenant, or on any other account whatsoever, was final. So in *Blanchard v.*

(a) 5 Barn. & Adol. 503.

(b) 5 B. & A. 848.

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Lilly (c), an award that certain actions should be discontinued, and that each party should pay his own costs, was held to be final, it being in effect an award of a *stet processus*. *Boodle v. Davis (d)* is precisely in point with the present case. There certain matters were referred to arbitration, and it was agreed that all the costs should abide the event of the award, and the Court held, that unless the arbitrator decided all the matters referred to him in favour of one party, the plaintiff and defendant must each pay his own costs; and *Patteson, J.*, said, "There being many matters in difference which are referred, and it being directed that the costs shall abide the event of the award, it seems to follow that each party must pay his own costs, unless all the matters in difference are decided in favour of one of them. If the Court were to say that the arbitrator could award as to the costs, it would be giving him a power independent of the submission." *Norris v. Daniel (e)*; *Dibben v. Marquis of Anglesea (f)*. In *Leeming v. Fearnley (g)*, it did not appear that an action of replevin was not maintainable.

Busby, contrâ.—By the terms of the submission the costs were to abide the event of the award; and as the arbitrator has directed that something shall be done by each party, the payment of the costs is left in uncertainty. In *Leeming v. Fearnley (g)* the marginal note is, A replevin suit, and all matters in difference touching the distress were referred to arbitration, the costs of the suit to abide the event. The arbitrator awarded that the rent was 14*l.*, and that 6*l.* were due for rent at the time of the distress; that the plaintiff in replevin should pay the defendant 6*l.*; and that the action should be no further prosecuted. It did not appear for what costs the defendant had avowed; and it was held that the award did not shew who ought to pay the costs, and, consequently, that it was not final.

TINDAL, C. J.—The only objection made to this award is, that it does not clearly shew by whom the costs of the suit are to be paid. The terms of the order of reference are, that the costs of the suit and of the reference shall abide the event of the award. We must therefore see if this is a bad award. Instead of declaring which of the parties is entitled to a verdict in the action, the arbitrator directs that the defendant shall deliver a certain quantity of flints to the plaintiff, and that the plaintiff shall pay the defendant a sum of money: he also directs that all proceedings in the action shall cease, and that each party shall give the other a general release. This does not appear to me to be a bad award in itself; something is directed to be done on both sides, and a boon is given to each party. As to the costs, the arbitrator had no power over them by the terms of the submission, and the effect of this award is, that neither party is entitled to costs.

GASELEE, J., concurred.

BOSANQUET, J.—I am of the same opinion. The parties agreed that the costs should abide the event of the award, and the arbitrator had no other authority as to the costs. Then the award must be construed to be made

(c) 9 East, 497.

(d) 4 Nev. & Man. 788.

(e) 10 Bing. 507.

(f) 10 Bing. 568.

(g) 5 B. & Ado. 403.

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partly in favour of one party, and partly in favour of the other; and the event is, that each party must pay his own costs.

Rule discharged (h).

(h) Mr. J. Park was absent at chambers.

Nov. 11th.

KNIIGHT'S BAIL.

It is too late after bail are sworn to object that the costs of a former opposition have not been deposited with the officer of the Court.

THE plaintiff had successfully opposed the justification of the bail in this action on a former day.

Thomas now opposed the justification, but the bail passed, and immediately after they were sworn, he objected that the costs of opposing the former justification had not been deposited with the prothonotary. He stated that the officer had sworn the bail before he was aware of his intention to do so.

TINDAL, C. J.—You are too late to make the application. It is an inflexible rule of this court that such an objection should be made before the bail are sworn.

Nov. 4th.

PAUL v. GOODLUCK.

In an action against the sheriff for taking insufficient pledges in replevin, he is liable to the amount of the penalty in the bond, viz. double the value of the goods distrained.

CASE against the Sheriff of *Berkshire*, for taking insufficient pledges in *replevin*. At the trial before *Lord Denman, C. J.*, at the last *Berkshire Assizes*, it was in evidence that a *replevin* bond had been given, with a penalty in double the value of the goods distrained. The plaintiff proved the insufficiency of the sureties, and that his damages and costs exceeded the amount of the penalty in the bond. The jury gave a verdict for 170*l.*, the amount of the penalty.

Talfourd, Serjt., moved for a rule to shew cause why the verdict should not be reduced to the sum of 85*l.* upon the ground that the plaintiff was only entitled to recover the value of the goods distrained. The authorities upon this subject are contradictory. In *Yea v. Lethbridge* (a), it was held that the sheriff was not liable beyond the value of the distress taken. But in *Concanen v. Lethbridge* (b), this Court held that the plaintiff might recover damages even beyond the penalty of the bond. That case was followed by *Evans v. Brander* (c), where the liability of the sheriff was restricted to double the value of the goods distrained. To the same effect is *Baker v. Garratt* (d). On the other hand, *Abbott, C. J.*, in *Scott v. Waithman* (e), said that as the verdict in the *replevin* suit was merely for a return of the goods, the jury could not give a verdict for a sum which exceeded the value of the goods. It is admitted that the sureties would be liable to the full extent of the penalty, but as the sheriff is a public officer, he ought not to be liable beyond the value of the goods.

(a) 4 T. R. 433.
 (b) 2 H. Black. 36.
 (c) 2 H. Black. 547.

(d) 3 Bing. 56.
 (e) 3 Stark. N. P. C. 148.

TINDAL, C. J.—It is not disputed but that the sureties would be liable to the amount of the penalty in the bond: and in *Hefford v. Alger* (f), which was subsequent to *Evans v. Brander* (g), it was held that the two sureties were not, together, liable beyond that amount. After this double decision I see no reason for disturbing the principle which has been established.

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The other judges concurred.

Rule refused.

(f) 1 Taunt. 218.

(g) 2 H. Black. 547.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Hilary Term, 1836.

CUMPSTON and an'. Ass^{es}. of HAIGH, a Bankrupt, v. HAIGH.

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Jan. 18th.

TROVER brought by the plaintiffs, as assignees to recover certain oil, madder, camwood, logwood, and one dye-pan. The defendants pleaded, that, before the bankruptcy, they were possessed of a certain scribbling and fulling-mill and premises, wherein they carried on their business of scribbling and fulling wool, for reward, and on certain terms, viz., that "all goods on hand were subject to a lien for a general balance;" that whilst they carried on their business on the said terms, the bankrupt, before he became bankrupt, brought divers large quantities of wool to the said mill of the defendants, to be by them scribbled and fulled in their said business for the said reward and on the said terms; during all which time the bankrupt had notice of the terms aforesaid on which the defendants carried on their business; and in respect of which said work of scribbling and fulling wool as aforesaid, the said bankrupt, before and at the time he became bankrupt, and at the time of the supposed conversion, was, and still is, largely indebted to the defendants for the said scribbling and fulling wool for him, in a certain large general balance, to wit, &c.; and the said goods and chattels in the declaration mentioned were delivered at the defendant's mill in the course of their said business, and before the said bankruptcy, and before and at the time of the said supposed conversion were and still are goods of the said bankrupt in the said mill and premises of the defendants, on hand, and subject to the said lien of the defendants for the said balance; of which said premises, the bankrupt, and the plaintiffs, assignees as aforesaid, respectively had notice, and that, by reason of the premises, the defendants, at the said time in the declaration mentioned, detained the said goods and chattels, and held them for their lien aforesaid, as they lawfully might, for the cause aforesaid, &c.

The owners of a scribbling and fulling-mill gave notice that "all goods on hand were subject to a lien for a general balance:"—*Held*, that goods on hand meant the yarn or cloth sent to the mill, and did not extend to articles used in scouring the cloth, or to materials used in dyeing it.

Replication:—That the said goods and chattels were not delivered before the bankruptcy at the defendants' mill, in the course of the defendants' said

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business in the plea mentioned; and were not, nor was any part thereof, before or at the time of the conversion thereof, in the declaration mentioned, goods of the said bankrupt in the said mill of the said defendants, on hand and subject to the said supposed lien of the defendants for the said general balance in the plea mentioned, in manner and form, &c.

The cause was tried at the last assizes for *Yorkshire*, before *Tindal, C. J.* It appeared that the defendants kept a scribbling and fulling-mill at *Slaitheite*, where cloth was taken by manufacturers in the neighbourhood to be scoured and milled, but not to be dyed; and in the mill a large board was affixed, bearing a notice that all goods on hand were subject to a lien for a general balance. The bankrupt, who was a relation of the defendants, had been accustomed to dye his cloths at the mill, as well as to scour them there; and the goods mentioned in the declaration, except the oil, had been sent to the mill to be used in carrying on that process. The oil was used in scouring the cloth, and it was kept locked in one of the rooms of the mill, and was served out as it was wanted by the bankrupts' servants.

Upon the bankruptcy of *Haigh*, the defendants refused to give up possession of the articles mentioned in the declaration, claiming a right of lien for a general balance due to them from the bankrupt. A verdict was found for the plaintiffs.

R. Alexander obtained a rule *nisi* to set the verdict aside and to enter a non-suit, or to reduce the damages.

Tomlinson shewed cause. The defendants state in the plea that they are scribblers and fullers, but there is no averment that they are dyers, which is quite a different branch of the manufacture of cloth. All the articles mentioned in the declaration, except the oil, were used in the process of dyeing the cloth, with which the defendants had nothing to do. As to the oil, which was used in the process of scouring, that was kept by the servants of the bankrupt under lock and key, and was handed out in small quantities for use as it was wanted. [*Tindal, C. J.*—The key of the mill was kept by the defendants.] It was; but the oil was under the control of the bankrupt. There is no instance of a particular or general lien being allowed to the extent claimed by this plea. In *Houghton v. Matthews*, (a) *Heath, J.*, says, "There are two species of liens known to the law, namely, particular liens and general liens. Particular liens are where persons claim a right to retain goods in respect of labour or money expended upon them; and those liens are favoured in law. General liens are claimed in respect of a general balance of account; and these are founded in custom only, and are, therefore, to be taken strictly." And in *Rushforth v. Hadfield*, (b) *Lord Ellenborough, C. J.*, in speaking of general liens set up by carriers, observes—"A common carrier is bound by the custom of the realm to carry goods for a reasonable reward to be paid for the same goods; and the law gives him a lien on the particular goods for the price of the carriage of them; and by special contract with the customer, he may extend that right to a lien for his general balance. But if it be insisted on that there is a general custom of trade, applicable to all carriers, to have a lien for their general balance, it should be shown in a very different manner in evidence. Common carriers have already gone a great way in cutting down the general right of the subject, in limiting their general liability by

(a) 3 Bos. & P. 494.

(b) 6 East, 522.

special notices; and now they are striving, on the other hand, to extend their lien to cover their general balance. These continual encroachments will require the interference of the legislature." If the lien is supposed to attach in consequence of the notice which was given, the answer is, that the materials sought to be recovered are not "*goods on hand*." The notice is only applicable to the woollens which were fulled and scribbled by the defendants, and does not extend to dye wares used by the bankrupt in another and totally different part of the process of manufacturing cloth.

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Alexander and Hoggins, contrd.—The question between the parties depends upon the construction of the notice, for it is admitted that the defendants had a lien upon all woollen goods on hand. Now the oil was used in the process of fulling and scribbling cloth, and it was kept in the defendants' possession. The words "*all goods on hand*" may fairly be taken to mean all goods and materials which remained in the mill for the purpose of being used in the manufacture of cloth. In *Jacobs v. Latour*, (c) *Best*, C. J., says, "As between debtor and creditor, the doctrine of lien is so equitable, that it cannot be favoured too much."

TINDAL, C. J.—This rule must be discharged. The question is, whether the defendants have shown themselves entitled to a lien upon the oil and dying wares, either by an express stipulation made between the parties or by a particular usage of trade. The right is not set up upon the latter ground. The question therefore, is, whether there was any express stipulation made between the parties. This turns upon the Notice which was proved to be stuck up within the mill, viz., "*all goods on hand are subject to a lien for a general balance*." For the defendants it is contended, that the word "*goods*" must be taken to extend to all goods, of whatever description, which were left at the mill, including adscititious articles, which are used in the process of making cloth. But, to sustain this meaning, two interpretations must be put upon these words; for first, it must mean the yarn or cloth which is brought to the mill to be manufactured, with respect to which there can be no doubt that the lien would attach, and secondly they must have a secondary meaning, and include articles which are undoubtedly used in the manufacture of the goods. But if the defendants had intended to stipulate that their right of lien should be thus extensive, their notice should have been more distinct, and they should have said expressly, that all goods, and articles used in the process of preparing the goods, should be subject to a right of lien. Taking the case, therefore, upon this footing alone, the rule must be discharged; but, by the evidence, it appeared that the defendants and the bankrupt were nearly related, and that the latter was the only person who dyed his goods at the mill, or who kept dying materials there, and therefore it is probable that the notice was only intended to apply to those goods which were most frequently on hand.

PARK, J.—This is a lien by contract between the parties, and I agree that the articles in question do not come within the meaning of "*goods on hand*." The oil was under the control of the bankrupt's servants.

GASELEE, J.—I am of the same opinion.

(c) 5 Bing. 132.

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BOSANQUET, J.—The question is, what is the proper construction of the notice. It is impossible to suppose that the notice can apply to the goods which are the subject of the present action.

Rule discharged.

WHITTON v. PEACOCK. (a)

1. One *Littlehales* made a lease of copyhold premises in 1762, subject to certain covenants, to be performed by the lessee and his assigns. *Littlehales* having at that time, only an equitable interest in the premises. In 1776 he obtained the legal estate, and the question was, whether the assignee of the reversion could maintain an action against the assignee of the lessee, for breach of the covenants in the lease of 1762:—*Held*, that the action was not maintainable.

2. After the lessor had obtained the legal estate, he granted another lease, in which the former lease of 1762 was recited, but it was agreed that it should continue in force, and the same rent remain reserved:—*Held*, that the assignee of the reversion could not sue for breach of the covenants contained in the lease of 1762.

IN pursuance of an order made by his Honor the Master of the Rolls, in this cause, the following case was stated for the opinion of the judges of this court:—

The parcels of land called *Hornsey Lane Field*, comprised in the leases hereinafter stated, are copyhold of inheritance, of the manor of *Harringay*, otherwise *Hornsey*, in the county of Middlesex.

On the 11th June, 1729, *Joseph Storey* and *Martha* his wife, surrendered the same to the use of *Elizabeth Benet*, her heirs and assigns, for ever, according to the custom of the said manor, on condition, that if the said *Storey* should pay to the said *Elizabeth Benet* 200*l.* on the 12th December, then next, the said surrender should be void.

On the 22nd day of November, 1732, the said *Storey* and his wife surrendered the premises to the use of the said *Elizabeth Benet*, her heirs and assigns, for ever, according to the custom of the said manor, on condition, that if the said *Storey* should pay to the said *Elizabeth Benet* 200*l.*, on the 12th June, then next, the said surrender should be void.

The sums of 200*l.* and 200*l.* mentioned in the above stated surrenders, were not paid according to the conditions thereof, and, at a court holden for the said manor, on the 27th April, 1753, the said *Elizabeth Benet* was admitted to the said premises, to hold unto the said *Elizabeth Benet*, her heirs and assigns, for ever, at the will of the lord, according to the custom of the said manor.

Before the 15th March, 1755, the said *Elizabeth Benet* died seised of the premises, having made her will, dated the 18th June, 1753, whereby she gave and devised the said copyhold estate unto her nephew, *Benet Garrard, Esq.* but she did not surrender the said premises to the use of her will, or make any surrender whatsoever.

At a court holden on the 15th March, 1755, the said *Benet Garrard* was admitted tenant, to hold unto the said *Benet Garrard*, his heirs and assigns, for ever, at the will of the lord, according to the custom of the said manor.

At the same court, the said *Benet Garrard* and *Samuel Storey*, customary heir of the said *Joseph Storey*, surrendered the said premises, to the use of *Bendall Martyn*, his heirs and assigns, according to the custom of the said manor; and the said *Bendall Martyn* was admitted tenant, and surrendered the same to the use of his will.

On the 11th March, 1761, the lord of the said manor granted license to the said *Bendall Martyn* to demise the said premises from Christmas, then last, for the term of ninety-nine years, or for any less term.

Before the 13th April, 1762, the said *Bendall Martyn* died, seised of the premises, and by his will, dated the 25th March, 1760, gave and devised the same unto *Maria*, the wife of *Baker John Littlehales, Esq.*, to hold to her, her heirs and assigns, for ever.

(a) This case was argued in Trinity Term.

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At a court holden the 13th *April*, 1762, the said *Maria Littlehales* was admitted tenant, to hold unto the said *Maria Littlehales*, her heirs and assigns, for ever, at the will of the lord, according to the custom of the said manor; and at the same court, the said *Baker John Littlehales* and *Maria* his wife, surrendered the premises to the use of the said *Baker John Littlehales*, his heirs and assigns, for ever, whereupon the said *Baker John Littlehales* was admitted tenant.

By indenture of lease, dated the 2nd *August*, 1762, between the said *Baker John Littlehales* and *Maria* his wife, of the one part, and *Philip Keys*, builder, of the other part, it was witnessed, that the said *Baker John Littlehales* and *Maria* his wife, in pursuance and part performance of an agreement, dated the 18th *March*, 1761, made between the said *Bendall Martyn*, of the one part, and the said *Philip Keys* of the other part: and by virtue of the aforesaid license by the said *Bendall Martyn*, obtained of the lord of the said manor for that purpose, did demise to the said *Philip Keys*, his executors, administrators, and assigns, a piece of ground, parcel of the said premises, to hold the same to the said *Philip Keys*, his executors, administrators, and assigns, from *Lady-day*, 1761, for ninety-eight years, paying to the said *Baker John Littlehales*, his heirs and assigns, the yearly rent of 5*l.* And the said *Philip Keys* did, for himself, his executors, administrators, and assigns, covenant, promise, and agree, to and with the said *Baker John Littlehales*, his heirs and assigns, that he, the said *Philip Keys*, his executors, administrators, and assigns, would pay to the said *Baker John Littlehales*, his heirs and assigns, the said yearly rent of 5*l.*, and would complete and finish, fit for habitation within six months from the date thereof, a certain messuage and buildings then standing on the premises, and sufficiently repair the same during the said term, and the same premises, at the end or other sooner determination of the term aforesaid, would surrender and yield up unto the said *Baker John Littlehales*, his heirs and assigns.

By another indenture of lease, of the same date, made between the same parties, the said *Baker John Littlehales* and *Maria* his wife, demised another piece of ground, parcel of the said premises, to the said *Philip Keys*, for a similar term, under the rent of 5*l.*, and under covenants similar to those contained in the last stated lease.

By indenture of assignment, dated the 20th *August*, 1762, made between the said *Philip Keys*, of the one part, and *David Main*, of the other part, the said *Philip Keys* assigned the said two several pieces of ground and premises to the said *David Main*, for the residue of the said terms of ninety-eight years, by way of mortgage, and subject to redemption, on payment of 400*l.* and interest, on the 20th day of *February* then next.

By indenture, dated the 31st *March*, 1766, made between the said *David Main*, of the first part, the said *Philip Keys*, of the second part, and *John Cator*, of the third part, the said *David Main*, and also the said *Philip Keys*, did assign the same pieces of ground and the two messuages thereon, to the said *John Cator*, for the then residue of the said terms of ninety-eight years, subject to a proviso for redemption, on payment, by the said *Philip Keys*, of the sum of 307*l.* 10*s.* and interest, on the 30th day of *September*, then next.

At a court holden for the said manor, on the 23rd *May*, 1770, it was found by the homage, and is entered, and appears from the court rolls, that the said *Elizabeth Benet*, then some time since, died seized of the premises, as hereinbefore stated, without having made any surrender to the use of her will; and

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that *Martha Leigh*, wife of *Peter Leigh*, Esq. who was the niece and customary heir of the said *Elizabeth Benet*, was admitted tenant, to hold the premises unto the said *Martha Leigh*, her heirs and assigns, for ever, at the will of the lord, according to the custom of the said manor.

At a court held on the 13th *February*, 1772, the said *Martha Leigh*, and on the 19th of the said month of *February*, the said *Peter Leigh*, surrendered the premises to the use of the said *Baker John Littlehales*, his heirs and assigns, for ever, according to the custom of the said manor, whereupon the said *Baker John Littlehales* was admitted to the premises, to hold unto the said *Baker John Littlehales*, his heirs and assigns, according to the custom of the said manor.

By indenture of lease, dated the 3rd *July*, 1773, made between the said *Baker John Littlehales* and *Maria* his wife, of the one part, and the said *Philip Keys*, of the other part, reciting the said two indentures of lease, of the 2nd *August*, 1762, and reciting, that the said parties to the said indentures of lease, and to the now reciting indenture, had come to a further agreement respecting the said field, called *Hornsey Lane Field*, whereby they had agreed that the said *Philip Keys* should have the whole of the said field leased to him, at the yearly rent of 10*l.* only, and no more; but, instead of cancelling the two several leases already granted of part thereof, and thereinbefore recited, the same leases should remain, and another lease be granted of the residue of the said field, at the yearly ground rent of 10*l.*, which rent should be considered the same as the two several rents of 5*l.* each, so reserved by the said two leases as aforesaid, and that notwithstanding such several reservations, no more than to the amount of the yearly rent of 10*l.* in the whole, should be payable for the said field, and the messuages or tenements erected and built thereon. It was witnessed that, in pursuance of such last-mentioned agreement, and by virtue of the said license, and in consideration of the yearly rent and covenants thereafter reserved, they the said *Baker John Littlehales* and *Maria* his wife, did demise, lease, set, and to farm let, unto the said *Philip Keys*, his executors, administrators, and assigns, the said field, called *Hornsey Lane Field*, except such parts of the said field as had already been demised to the said *Philip Keys*, by the said two several indentures of lease thereinbefore recited, to hold the same, (except as aforesaid,) with their appurtenances, unto the said *Philip Keys*, his executors, administrators, and assigns, from *Lady-day*, 1761, for the term of ninety-eight years, from thence next ensuing, yielding and paying for the first two years of the said term the rent of a pepper-corn, and also yielding and paying yearly, during all the remaining ninety-six years of the said term of ninety-eight years, unto the said *Baker John Littlehales*, his heirs and assigns, the yearly rent of 10*l.*: and the said *Philip Keys* did thereby for himself, his executors, administrators, and assigns, covenant with the said *Baker John Littlehales*, his heirs and assigns, that he would pay the said yearly rent of 10*l.*, and that he the said *Philip Keys*, his executors, administrators, or assigns, should and would well and sufficiently repair, and keep in repair, the premises thereby demised, and all the messuages or buildings which then were or should be erected thereon, and the same premises being so well and sufficiently repaired, at the end of the term aforesaid, peaceably leave, surrender, and yield up, unto the said *Baker John Littlehales*, his heirs and assigns. And in the same indenture of lease is contained a proviso, that if the said yearly rent of 10*l.* should be unpaid, by the space of thirty days next after any of the days

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of payment, that then it should be lawful for the said *Baker John Littlehales*, his heirs and assigns, into the said premises to re-enter; and also a covenant, on the part of the said *Baker John Littlehales*, his heirs and assigns, with the said *Philip Keys*, his executors, administrators, and assigns, for quiet enjoyment of the said thereby demised premises, on payment of the said yearly rent, and performance of the covenants in the said indenture of lease contained: and in the last-mentioned indenture is contained a proviso, that the yearly rent of 10*l.* thereby reserved, was meant and intended to be, and was the same as the two several yearly rents of 5*l.* each, so respectively reserved by the said two several indentures of lease thereinbefore recited; and that for and notwithstanding anything therein, or in the said two several indentures of lease contained to the contrary, no more than the yearly rent or sum of 10*l.* should be paid or payable for the whole of the said field called *Hornsey Lane Field*, so respectively reserved by those presents, and the two several indentures of lease thereinbefore recited, and any messuages, tenements, erections, or buildings, which then were, or should or might be erected, built, or made thereon, or on any part thereof.

By various surrenders and admittances, the said customary estate of inheritance of *Baker John Littlehales* and *Maria* his wife, in the said premises, became vested in the plaintiff in this cause, who, at a court holden for the said manor, on the 6th *May*, 1833, was admitted to the same, to hold to her, her heirs and assigns, according to the custom of the said manor.

The question for the opinion of the Court was, whether the plaintiff could maintain an action of covenant against the assigns of the said *Philip Keys*, for breach of the covenants contained in the above stated leases of the 2nd *August*, 1762, or either of them?

Talfourd, Serjt. for the plaintiff.—The defendant is estopped from disputing the title of the plaintiff; *Palmer v. Ekins*, (a) and in that case it is said, that “where the estoppel works on the interest of the land, it runs with the lands, into whosoever hands the land comes,” *Trevivan v. Lawrence*. (b) So in *Parker v. Manning*, (c) where it was held in an action of covenant for rent, on an indenture brought by the assignees of the lessor, who had become bankrupt, that the lessee could not plead that the lessor *nil habuit in tenementis*. In principle, there is no distinction between that case and the present, which is its converse.

In *Omelaughland v. Hood*, (d) it is said, “If A. mortgages land to B., upon condition to re-enter on payment of 10*l.*, and after A., before the day of payment is come, being in possession, makes a lease for years, by indenture, to C., and then after performs the condition, this shall make the lease to C. good against himself by estoppel; and it was farther adjudged, that even the feoffee of A. should be bound by this lease, which took its effect only, at first, by estoppel, because he, coming in under one who was estopped, should be himself estopped likewise, which was still a stronger case than the first; and this was adjudged in *Ireland*, and afterwards affirmed on a writ of error here, and seems a very reasonable judgment; for if a subsequent purchase shall make good a lease of lands by indenture, though the lessor had nothing in those

(a) 2 Lord Ray. 1550.

(b) 1 Salk. 276; 6 Mod. 256; 2 Wms. Saund. 418; note (1.)

(c) 7 T. R. 537.

(d) Bac. Abr. tit. “Leases,” O.; Rol. Abr. 874, 876.

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lands at the time of the lease, and therefore his lease at first could only take effect by estoppel; much more in this case, where the lessor had a possibility of coming into the lands again, shall his performance of the condition after make good the intermediate lease; and so it should seem, too, if the condition were broken at the time of the lease, so as he had then nothing but an equity of redemption; yet if he should after be admitted to redeem in chancery, this would make good the intermediate lease, which took effect at first only by estoppel."

Again, in Coke Lit. 47 b. it is said, "If A. had nothing in the land, and make a lease for years, by deed indented, and after purchase the land, the lessor is as well concluded as the lessee to say, that the lessor had nothing in the land;" and in the note to this passage it is said, "*Et videtur*, that by the purchase of the land, that is turned into a lease in interest, which before was purely an estoppel." (a) Applying this to the present case, when *Martha and Peter Leigh* had surrendered the premises to *Littlehales*, in 1772, and after he was admitted, the leases of the 2nd August, 1762, became good in point of interest. In 1 Wms. Saund. 325 a, and note 4, it is said, "Where the declaration states the lease to be by indenture, the plaintiff need not reply the estoppel, but may demur, because the estoppel appears on the record." Therefore, the question of fact, as to the seisin of *Littlehales*, would not arise. In *Whaly v. Anderson*, (b) it is said by *Windham*, one of the counsel, "And I have known that where one mortgageth lands, and after leaseth by estoppel, and after procureth money to be repaid, and assignment to be made, it was held, that the lease by estoppel would first take place, before the assignment, which *Twiss* remembered, the case of a poor man in *Hackney*." *Taylor v. Needham* (c) decides, that the assignee of a lessee is estopped by the deed which estops his assignor.

Secondly, The lease of 1773 contains a covenant, on the part of the lessee, to pay the rent reserved in the leases of 1762, which, it was agreed, should not be cancelled. It clearly amounts to an agreement, under seal, to confirm the former leases, and the Court will imply such a covenant as will effectuate the intention of the parties, *Saltoun v. Houston*, (d) where Lord *Gifford*, C.J. says, "The Court must look at the whole of this instrument, and if they find it contains a clear agreement to do any act, whether in the way of covenant, provision, or even exception, then it is clear that an action of covenant may be maintained on the instrument." That case was confirmed in *Sampson v. Esterby*. (e)

Wightman for the defendant. As *Elizabeth Benet* never surrendered the premises to the use of her will, the lessors who made the leases in 1762 had at that time only an equitable title; and Stat. 32 H. 8, c. 34, which gives the assignee of the reversion a right to sue does not apply to such a case. In 1 Wms. Saund. 233 a, note (2), the rule is laid down "Where the plaintiff declares in covenant upon a demise by himself, he is not obliged to set out any title, &c., to the lands demised, but may begin his declaration with stating, that whereas by a certain indenture, &c., he demised, &c. (f) But in an action

(a) Note 307, from Hale's MSS.

(b) 1 Keeble, 876.

(c) 2 Taunt. 282.

(d) 1 Bing. 444.

(e) 9 B. & Cress. 505; 6 Bing. 644.

(f) Citing 1 Str. 230, 231; *Aloberry v. Walby*, Cart. 32; Lib. Plac. 97; Lill. Ent. 130, 141.

by an assignee of the reversion, he must set out the title of the lessor to the demised premises, that it may appear he had such an estate in the reversion as might be *legally assigned* to the plaintiff." (g) Here the lessor had no such estate as would enable him to convey a right to his assignee to sue, for the assignee must state a legal title on the record, or he has no right to recover; and the defendant may take advantage of any defect in that title, and every part of it is material and traversable. *Palmer v. Ekins* (h) and *Parker v. Manning* (i) are, therefore, distinguishable from this case. *Carvick v. Blagrove* (j) was an action of covenant by an assignee against the lessee, the lease was for nine years, carved out of a term of twenty-two years. The defendant pleaded that the lessor was not possessed of the term for twenty-two years, and it was held, that he might do so, as he did not deny the title of the lessor to grant the term he possessed, but only the plaintiff's title; and *Dallas*, C. J., said—"The allegation of the possession by the lessor for twenty-two years is made by the *assignee*, and not by the lessor, and the lessee has a right to know whether there is a privity between him and the assignee, by means of a conveyance by the lessor of a true title. He cannot be prevented from putting in issue any material fact alleged by the assignee." In *Seymour v. Franco*, K. B. Mich. T. 1828, (k) *Bayley*, J., said—"I quite approve of the decision in the case of *Carvick v. Blagrove*. You, when sued by the assignee of a lessor, are at liberty to say, that he had not such an interest as could pass to his assignee." These were covenants in gross. In *Webb v. Russell*, (l), it was held, that if a mortgagor and mortgagee make a lease, in which the covenants for the rent and repairs are only with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of these covenants, because they are collateral to his grantor's interest in the land, and therefore, do not run with it. Lord *Kenyon*, C. J., said—"It is stated that *Stokes* was only a mortgagor, who had parted with his whole term to the mortgagee; and the declaration goes on to state, that the whole interest which was vested in him he had transferred to the mortgagee. Therefore, in point of law, I cannot conceive how this covenant made with *Stokes* can be said to run with the land, for *Stokes* is stated in the declaration to have no interest whatever in the land; and yet both the *implied* covenant arising from the 'yielding and paying,' and also the *express* covenants, are entered into with *Stokes*. It is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be a privity of estate between the covenanting parties. But here *Stokes* had no interest in the land of which a court of law could take notice; though he had an equity of redemption, an interest which a court of equity would take notice of. These therefore were collateral covenants. And though a party may covenant with a stranger to pay a certain rent in consideration of a benefit to be derived under a third person, yet such a covenant cannot run with the land." This case is, therefore, fully in point, and meets the argument on the other side.

But it is contended, that an action could be maintained because the deed of

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(g) Citing Clift's Ent. 219, pl. 7; Lill. Ent. 132, 135.

(j) 4 B. Moore, 303.

(h) 2 Lord Ray. 1550.

(k) Reported Vol. 7, Law Journal.

(i) 7 T. R. 537.

(l) 3 Term. R. 393.

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1773 confirms the leases of 1762, but it would be a most extraordinary extension of the doctrine of implied covenants if that proposition should be supported. It also appears, that *Keys* had assigned the leases by way of mortgage; and the term was undoubtedly in the mortgagee when the lease of 1773 was granted; but if that were not so, the mere recital of the leases would not give a right to the lessee to sue as upon an implied covenant in law; it was a mere covenant in gross, which does not run with the land.

Talfourd in reply.—The cases cited were determined on questions of pleading. In *Webb v. Russell*, (1) the covenant was made with one who was a mere stranger.

In the present term the following certificate was given:—

“We have heard this case argued by counsel, and have considered it, and we think the plaintiff cannot maintain an action of covenant against the assigns of *Philip Keys* for breach of the covenants contained in either of the leases of the 2nd of August, 1762.”

N. C. TINDAL,
 J. A. PARK,
 S. GASELEE,
 J. VAUGHAN.

CLEMENT v. WILLIAMS.

Jan. 21st.

The defendant's niece, who resided with him, was a material witness for the plaintiff, and it appearing to the Court that the defendant had refused to allow a subpoena to be served upon her, an attachment was granted against him.

STAMMERS obtained a rule *nisi* for an attachment against the defendant, under the following circumstances, which were stated in the affidavits. The defendant's niece, *Catharine Mary Knott*, was a material and necessary witness for the plaintiff, and he having issued a subpoena, a person was sent to serve it upon the witness, who resided with the defendant at his house. When the first application was made at the house, the defendant's wife stated that no such person as *Catharine Mary Knott* resided there. A second attempt to serve the subpoena was afterwards made, when the defendant was seen, who admitted that his niece was in the house, but he said she could not be seen, and that she could not attend at the trial, because he was too unwell to accompany her.

Gurney shewed cause, but the facts stated in support of the rule were not denied. It appeared that other legal proceedings were pending between the parties, and that the plaintiff kept back a witness whom the defendant wished to examine.

TINDAL, C. J.—If the defendant's witness is kept back, proceedings may be taken against the plaintiff. This is a case in which the attachment ought to be granted, and the costs must be paid by the defendant; but the attachment is not to be executed if the defendant forthwith affords proper facilities to enable the plaintiff to serve the niece with a subpoena.

Rule absolute.

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BROGDEN v. MARRIOTT.

DEMURRER. The declaration stated, that the defendant was possessed of a certain horse called *Partington*, and by an agreement, bearing date the 27th of *February*, 1835, the plaintiff agreed to buy, and the defendant agreed to sell his horse *Partington* to the plaintiff, for the sum of 200*l.* provided he trotted eighteen miles within one hour, and that to be done within one month from that day, and Joseph Norcliffe, of Ossett, to be the judge of the performance. If the task was not performed, the horse was thereby sold to the plaintiff for the sum of 1*s.* which the plaintiff that day paid to the defendant. After a statement of mutual promises, the plaintiff averred, that he had always been ready and willing to perform and fulfil the agreement, and, in part performance of the same, did, on the 27th *February*, 1835, pay to the defendant the sum of 1*s.*, in the said agreement mentioned, which the defendant then accepted and received. That after the making of the said agreement, and within one month from the date thereof, to wit, on the 16th of *March*, 1835, the said horse was tried by the defendant, in the presence of the said *J. Norcliffe*, to trot eighteen miles within one hour, but that the said horse did not then, in the judgment of *J. Norcliffe*, nor did in fact then, or at any other time within one month from the day of the date of the said agreement, trot eighteen miles within one hour, whereby the defendant became liable to deliver, and ought to have delivered, to the plaintiff the said horse, according to the true intent and meaning of the said agreement. The declaration then averred a demand of the horse by the plaintiff, and that the defendant refused to deliver it.

Pleas:—First, That the horse was not tried in the presence of *Norcliffe*, as stated in the declaration.—Conclusion to the country.

Second, That at the said trial in the declaration mentioned, the said horse could and would have trotted eighteen miles within one hour, but one *A. B.*, then being the servant of the plaintiff, and who was then present at the said trial, after the commencement of the said trial, and during the progress thereof, wrongfully and wilfully, as the servant and agent of the plaintiff, interrupted the trotting of the said horse, and hindered and prevented the horse from trotting the said eighteen miles within one hour.—Conclusion with a verification.

Third, That, after the making of the said agreement, and after the said trial, in the declaration mentioned, and within one month from the date of making the said agreement, to wit, on the 25th of *March*, 1835, the defendant was ready and willing to try the said horse to trot eighteen miles within one hour on that day, and the said horse could and would have done the same; and the defendant, within a reasonable time next before the day and year last aforesaid, gave the plaintiff and the said *Norcliffe* notice of such intended trial, and of the time and place at which the same was to take place; and the said *Norcliffe* was then requested by the defendant to be the judge of the performance of the said horse, at the said trial: that the said *Norcliffe* then, and at all times afterwards during the said space of one month, refused to attend, and did not attend to be the judge of the performance of the said horse, at the in-

1. The declaration set out a contract "that the defendant agreed to sell his horse to the plaintiff for 200*l.* provided he trotted eighteen miles within one hour, within one month, and one *Norcliffe* to be the judge of the performance; if the task was not performed, the horse was thereby sold to the plaintiff for 1*s.* :—*Held*, that a plea was ill, which stated that *Norcliffe* refused to attend upon request, whereby the horse was prevented from performing the task.

2. The defendant pleaded, that the horse would have performed the task, but that one *A. B.*, then being the servant of the plaintiff, wrongfully and wilfully, as the servant and agent of the plaintiff, interrupted the trotting of the horse :—*Held*, that a replication was good which traversed the whole of the plea.

3. Where demurrers were raised on the pleadings, subsequent to the declaration, the Court refused to hear an argument on the illegality of the contract declared upon, no exception being taken on that

point in the margin of the demurrer book.

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tended trial, whereby the said horse was prevented from trotting in the presence of the said *Norcliffe*, as judge, eighteen miles within one hour, within one month from the day of the making of the said agreement.—Conclusion with a verification.

Fourth, That the said trotting was a trotting race, or match against time on a public highway of the king, and that the agreement was therefore illegal and void.—Conclusion with a verification.

Replication.—To the *first* plea—Similiter. To the *second* plea—That the said *A. B.* in that behalf mentioned, did not, as the servant or agent of the plaintiff, interrupt the said trotting of the said horse, or hinder, or prevent the horse from trotting the said eighteen miles within one hour, in manner and form as the defendant had above in his second plea in that behalf alleged. Conclusion to the country. To the *third* plea, the plaintiff demurred specially, and the *fourth* plea was specially traversed.

Rejoinder.—To the demurrer to the *third* plea—Joinder in demurrer. To the replication to the *second* plea, the defendant demurred, and assigned for cause that the said replication put in issue two distinct facts, each of which, by itself, would amount to a sufficient and perfect answer to the plea; namely, as well that the said person in the plea mentioned was the servant or agent of the plaintiff, as that the said person interrupted the trotting of the said horse; whereas, it would be a sufficient replication, either to have traversed the allegation that the said person did interrupt the trotting of the horse, or to have denied that the said person acted as agent for or on behalf of the plaintiff; and also for that the replication was ambiguous, and pregnant with doubt whether the plaintiff intended to put in issue the fact of the said person in the plea mentioned, being servant or agent of the plaintiff, or the fact of such person interrupting the trotting of the said horse.

Issue was joined to the replication to the *fourth* plea, and the plaintiff joined in demurrer to the replication to the *second* plea.

Milner, for the plaintiff, in support of the demurrer to the *third* plea.—*Norcliffe* having once judged of the trotting of the horse, it was the duty of the defendant to have secured his further attendance, if he required it: At all events, by the agreement, the horse became the plaintiff's property for one shilling, if the horse did not trot eighteen miles within one hour; and if the defendant did not wish the plaintiff to have the horse for that sum, he should have secured the attendance of *Norcliffe*, to judge whether the horse trotted that distance within the time prescribed, in which case the defendant would have been entitled to the larger sum: the attendance of *Norcliffe* being therefore for the benefit of the defendant, he was bound to have enforced it; and the horse, not having in fact trotted the distance within the prescribed time, it belonged to the plaintiff. The plea is therefore no answer. The replication to the *second* plea is sufficient—the replication follows the language of the plea, and taken altogether, it contains but one connected proposition.

J. Bayley, contra.—The *third* plea is good. The defendant was not confined to a single trial of the horse, and by the refusal of *Norcliffe* to attend, the performance was rendered impossible. The naming *Norcliffe* as the judge

was the act of the plaintiff as well as of the defendant, and if it is held that the plea is no answer, the plaintiff had only to keep *Norcliffe* out of the way during the month, and then he would be entitled to the horse for one shilling. The agreement also gives the plaintiff an interest adverse to the life of *Norcliffe*, and is within the principle of *Gilbert v. Sykes* (a). The replication to the second plea is double. It would have been sufficient if the plaintiff had traversed the interruption, or that it was caused by his servant, and as the issue now stands, the defendant cannot tell which of those two separate answers would be set up at the trial. In *Moore v. Boulcott* (b), where the plea to an attorney's bill was, that the action was brought for charges at law and in equity, and that no bill was delivered, and the plaintiff traversed the entire plea, it was held ill, because the replication should have denied the existence of charges at law or in equity. Another objection is, that the declaration sets out an illegal contract upon the face of it. [*Tindal*, C. J.—That objection is not stated upon the margin of the demurrer book; under such circumstances, it would be very unfair on the other side to allow you to fall back upon that point, and it would be against the practice of this court] (c).

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TINDAL, C. J.—It appears to me that the third plea is bad in point of law. We must look at the nature of the contract made between the parties. It is a contract by which the plaintiff purchases the defendant's horse for one shilling, which is paid to him and accepted. But there is a condition annexed, which appears to me to be a condition subsequent, viz.: that provided the horse trotted eighteen miles within one hour, within a month, then the price of the horse was to be 200*l*. It was the duty, therefore, of the defendant to shew that this performance had taken place, or to excuse it, by shewing that it was prevented by the conduct of the plaintiff. But the plea contains no allegation that the performance did take place and that *Norcliffe* was satisfied, but on the contrary, it is admitted that the trial took place, and that *Norcliffe* was not satisfied. Then was a further trial prevented by the conduct of the plaintiff? There is nothing to shew that he had any thing to do with the refusal of *Norcliffe* to attend such further trial, and it was for the defendant's benefit that he should attend.

The next objection arises upon the second plea. That plea is itself informal, but that cannot be taken advantage of, as it is not assigned as a cause of demurrer. The plea is, that the horse would have trotted eighteen miles within one hour, but one *A. B.*, then being servant of the plaintiff, wrongfully, as the servant and agent of the plaintiff, interrupted the trotting of the horse. Now, in order to make this a valid plea, the defendant ought to have alleged that it was by the command of the plaintiff that his servant interrupted the horse, for the allegation as it stands, would be satisfied by shewing that the servant obstructed the horse without the command of the plaintiff. The plaintiff in his replication has traversed the very words of the plea: "that the said *A. B.* did not, as the servant or agent of the plaintiff, interrupt the trotting of the horse," and the defendant has misled the plaintiff by his own mode of pleading, if the replication is liable to the objections which have been urged.

(a) 16 East. 150.

(b) 1 Bing. N. C. 320.

(c) On a subsequent day, *Bayley* made

a further application, to be allowed to set the case down again, that this point might be raised, but the court refused to accede to it.

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This case differs from *Moore v. Boulcott* (d), which has been cited, for there the plaintiff put a different construction upon the statute, which requires a signed bill of costs at law or in equity to be delivered; in that case, the replication should have denied that the costs were incurred at law or in equity. Our judgment must be for the plaintiff.

PARK J. concurred.

GASELEE, J.—I am of the same opinion. If the argument could be sustained, that any number of trials might be made, the plaintiff would be liable to be called upon to give up every moment of his time during the whole month, which could not have been the intention of the parties. With respect to the second plea, the plaintiff has traversed the main allegation by his replication, viz.: that the person mentioned in the plea, did not, as the servant or agent of the plaintiff, interrupt the trotting of the horse, or hinder or prevent the horse from trotting the said eighteen miles within one hour.

The third objection is, that the declaration discloses an illegal contract, but that point is not stated in the points specified for the argument, and as there is a plea in which the objection is raised, the cause may go down for trial upon that point, which is a proper question for the decision of a jury.

BOSANQUET, J.—I am of the same opinion. The horse was sold upon condition, that in a certain event 200*l.* should be paid by the plaintiff, and it was the interest of the defendant to see that the event did take place, and it lay on him to procure the attendance of the judge. Then it is said that the replication is double, because it would have been sufficient to traverse either of the two allegations in the plea, but unless the horse was interrupted by the plaintiff's servant acting in that behalf, it would be insufficient, and such an interruption might have taken place, as would have made it unsafe for the plaintiff to traverse one fact only.

Judgment for the plaintiff.

Feb. 1st.

GLADSTONE and another, Assignees, v. WHITE and LEWIS.

In a joint action of trover against two defendants, one of them who claimed no title to the goods was held to be entitled to relief under the Interpleader Act.

TROVER brought by the plaintiffs as assignees, against the defendants, to recover a quantity of oil which had been deposited with the defendant *White* by the insolvent.

Chadwick Jones, on behalf of *White*, had obtained a rule under the first section of the Interpleader Act, (a) upon an affidavit which shewed that the defendant *Lewis* had given him notice that he had a lien on the oil, to the amount of 50*l.*, and had threatened to take proceedings against him if he delivered the oil to the assignees. *White* claimed no interest in the oil.

Wilde, Serjt., for the assignees, proposed that the oil should be delivered to the present plaintiffs, they paying 50*l.* into court, and that an issue be

(d) 1 Bing. New Cases, 323.

(a) 1 & 2 *Wm.* 4, c. 58.

directed to decide *Lewis's* claim. *Lewis* to be the plaintiff, and the assignees defendants.

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TINDAL, C. J.—Is this case within the statute?

Hoggins, who appeared for *Lewis*, stated, that he believed similar applications had been granted.

The Rule was ordered to be drawn up in the form proposed by *Wilde*, Serjt.

Jones then applied for *White's* costs, which he had incurred in making the application.

Wilde, Serjt., said, an indemnity had been offered to *White*, who had refused to accept it.

PARK, J.—The costs cannot be allowed. If *White* had not been offered an indemnity it might have made a difference.

GRIFFIN v. YATES.

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ASSUMPSIT on a bill of exchange, payable six months after date, drawn by one *William Lambert*, upon and accepted by the defendant, and indorsed by *Lambert* to the plaintiff.

The replication *de injuria* is applicable in assumpsit where the plea contains matter of excuse.

Plea.—That the defendant accepted the said bill of exchange in the declaration mentioned, for the accommodation of the said *William Lambert*, and upon the understanding and promise of the said *William Lambert* in that behalf then made and given that he, the said *William Lambert*, should, on application, furnish the funds for the payment of the said bill, and that he, the defendant, should not be called on to pay the said bill until it should be at the will and discretion of him the defendant so to do, and that no consideration whatsoever was ever given to the defendant or to any other person or persons for or on account of the acceptance or payment by him the defendant of the said bill of exchange, or for any part of the same: And the defendant further saith, that the said *William Lambert* indorsed the said bill of exchange to the plaintiff after the said bill of exchange became due and payable for the accommodation of the plaintiff, and without any consideration being given to the said *William Lambert*, or to any other person or persons for the said bill or for any part of the same. Conclusion with a verification. *Replication*.—That he, the defendant, did not accept the said bill of exchange in the declaration mentioned for the accommodation of the said *William Lambert*, and upon the understanding and promise of the said *William Lambert* in that behalf, then made and given, that he, the said *William Lambert*, should, on application, furnish the funds for the payment of the said bill, and that he, the said defendant, should not be called upon to pay the said bill until it should be at the will and discretion of him the said defendant so to do, and without any consideration whatsoever being ever given to the defendant or to any other person or persons for or on account of the acceptance or payment by him, the defendant, of the said bill of exchange, or for any part of the same; and that

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the said *William Lambert* did not indorse the said bill of exchange to the plaintiff after the said bill of exchange became due and payable for the accommodation of the plaintiff, and without any consideration being given to the said *William Lambert*, or to any other person or persons, for the said bill or any part of the same in manner and form, as the said defendant had above in his said plea alleged; and that the plaintiff prayed might be inquired of by the country, &c.

The defendant demurred, and the causes assigned were, that the replication traversed and put in issue the allegation, that defendant accepted the bill of exchange for the accommodation of *Lambert*, and upon the undertaking of *Lambert*, that he should furnish the funds for the payment of the said bill, and that defendant should not be called upon to pay the said bill until it should be at his will and discretion so to do, and without any consideration being given to defendant, or to any other person on account of the acceptance or payment by defendant of the said bill of exchange; and had also traversed and put in issue the allegation, that the said *Lambert* indorsed the said bill of exchange to plaintiff, for the accommodation of the plaintiff, and without any consideration being given to the said *Lambert*, or to any other person for the said bill, or for any part of the same; whereas, the plaintiff, by his said replication, ought to have traversed one only of such allegations. Joinder in Demurrer.

*Stephen*, Serjt., in support of the demurrer.—The plea contains two material and traversable allegations, each of which might have been separately traversed, but the plaintiff is not entitled to deny both: *Brook Abr.* tit. *Double plea*, pl. 90. The replication is therefore bad, as being double.

*Butt*, contrà.—The late rules on pleading have not introduced any new principles, but have merely altered the mode of pleading.—In trespass, a general replication of *de injuriâ* has always been allowed, provided the several facts put in issue, constituted but one cause of defence. So, in replevin, *Selby v. Bardons* (b). [*Humfrey*, as *amicus curiæ*, stated that in *Isaac v. Farrar* to an action by the indorsee of a promissory note, the defendant pleaded fraud in the drawing of the note—that it was indorsed without any consideration, and that there was no consideration between any of the parties.—*Replication, De injuriâ*, and that the case having been argued on demurrer, in the Exchequer, during the present term, the Court had taken time to consider their judgment (c).] That case may therefore be treated as an authority for the plaintiff, as far as it goes; for either of the facts stated in the plea was an answer to the action, and *de injuriâ* would probably be a good replication in the present case. But that need not be contended, for the facts stated in this plea constitute but one cause of defence, and the replication may therefore traverse the whole of the plea. *O'Brien v. Saxon* (d). That the plea does not contain several defences, appears by the principle laid down in *Crisp v. Griffiths* (e). *Stein v. Yglesias* (f). *Noel v. Rich* (g). Those cases show that the defendant must

(b) 3 B. & Ado. 1.

(c) See the arguments in *Whittaker v. Mason*, ante 321, and note (a).

(d) 2 Barn. & Cress. 908.

(e) 2 Cr. M. & R. 150; 1 Gale, 106, S. C.

(f) 1 Cr. M. & R. 665; 1 Gale, 96, S. C.

(g) 1 Gale, 225.

have proved all the facts which he has pleaded, to entitle him to a verdict :— If this be not so, then the plea is bad for being double.

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*Stephen* in reply.—The replication *de injuriâ* is an exception to the general rules of pleading, and was formerly only used in actions of trespass and trespass on the case, and was supposed not to be applicable to replevin, until the contrary was decided in *Selby v. Bardons* (h). But this is not a replication of *de injuriâ*, and the general rule of pleading must prevail, and only one of the allegations in the plea ought to have been traversed. It is undoubtedly true that it is now frequently difficult for the plaintiff to elect which of the allegations in the plea he may best traverse; but the difficulty ought not to alter the principles of pleading. In *Robinson v. Raley* (i), Lord Mansfield allowed a replication, which was objected to as putting more than one fact in issue, 'because the several matters made up but one entire defence. He says, "It is true, you must take issue on a single point: but it is not necessary that this single point should consist only of a single fact. Here, the point is, the cattle being entitled to common: this is the single point of the defence. But in fact, they must be both his own cattle, and also levant and couchant, which are two different essential circumstances, of their being entitled to common; and both of them absolutely requisite."—[*Bosanquet, J.*—May not the substance of this plea be that this was an accommodation bill, when in the hands of the plaintiff?] It would be a strained construction, to say that in the present case, all the matters pleaded make but one defence. In *Webb v. Weatherby* (k), where the defendant pleaded accord and satisfaction, and the plaintiff replied that the defendant did not pay in satisfaction, nor did the plaintiff receive in satisfaction, it was held that the replication was good, because the two propositions were substantially the same. [*Tindal, C. J.*—It is of great importance that some general rule should be laid down in cases of this kind. If a general denial of the whole of the facts stated in the plea is allowed, the utility of the new rules will be lessened: on the other hand, I must say, that great inconvenience is sometimes sustained, where the plaintiff having taken issue on one material allegation, the fact of his not having denied the other matter, is made a means, in some way or another, of slandering his title when the case goes to the jury.]

*Cur. adv. vult.*

*TINDAL, C. J.*—In this case we had little doubt, during the argument, but that the replication *de injuriâ sud propriâ absque tali causâ*, would have been the more correct mode of pleading. And we find that there is a decision in the Court of Exchequer, to the effect that such a replication is applicable to an action of assumpsit. As the point was doubtful, the plaintiff may have leave to amend, upon payment of costs.

*Stephen, Serjt.*—The effect of your lordship's decision is, that *de injuriâ* may be replied in assumpsit.

(h) 3 B. & Adol. 2.

(k) Ante, 39; 1 Bing. N. C. 502.

(i) 1 Burr. 320.

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TINDAL, C. J.—Yes, in all cases where the plea contains matter of excuse.

BOSANQUET, J.—The Court of Exchequer has given a judgment to the same effect (1).

Rule accordingly.

(1) *Isaac v. Farrar*.

Jan. 23rd.

LYSONS, Executrix of GARDINER, v. BARROW and another.

1. Where there are *bona notabilia* in a peculiar, and also in other parts of the diocese of the archbishop, a prerogative administration is not absolutely void, and will therefore be considered valid at law, until it be set aside by proceedings in the Ecclesiastical Court.

2. Whether in such a case a metropolitan administration is voidable, *quære*.

**A**SSUMPSIT for 2,000*l.* money had and received by the defendants to the use of the plaintiff, as executrix of one *Gardiner*. The plaintiff made proof of the will and probate of the deceased, in the Prerogative Court of *Canterbury*, and letters of administration in the Prerogative Court of *York*.

After craving *Oyer*, the defendants' pleas were,

*First*, Non-assumpsit.

*Second* plea, That before and at the time of the death of the said *Gardiner*, the said defendants were, and from thence hitherto have been, and still are, resident and commorant in the parish of *Southwell*, in the county of *Nottingham*, which said parish of *Southwell*, during all the time of the said residence, and commorancy there of the said defendants, was, and still is within the peculiar jurisdiction of the Chapter of the collegiate Church of the blessed *Mary* the virgin of *Southwell*, in the county of *Nottingham*, and out of the jurisdiction of the Archbishop of the province of *York*: and the defendants further say, that the said sum of 2,000*l.* was received by the defendants after the death of the said *Gardiner* deceased, from certain persons carrying on the business of an insurance company, under the name and style of "The Law Life Assurance Society," under and by virtue of a certain policy of assurance, in writing heretofore, and in the life-time of the said *Gardiner*, to wit, on the 10th of September, 1831, caused by the defendants to be made: (here the policy was set out), and the defendants say, that the Plaintiff, by averring the said sum of 2,000*l.* to have been received for her use, as executrix, supposed the truth to be, and intends to say, that the defendants before and at the death of the said *Gardiner*, held the said policy for the use of the said *Gardiner*; which supposition the defendants, for the purposes of this plea only, admit to be true, and aver the fact to have so been; and the defendants further say, that the said promise, in the declaration mentioned, was not an express promise made by the defendants, but a promise intended by the plaintiff to be implied by law from the receipt of the said sum of 2,000*l.* by the defendants, and the matter so supposed to be true as aforesaid; and the defendants further say, that there was never any contract between the said society and the said *Gardiner*, or between the said society and the plaintiff, as executrix aforesaid, in respect of the said policy or the said sum of 2,000*l.* insured thereby: but that the said insurance company contracted solely with the defendants, according to the terms of the said policy as therein-before stated and set forth; by reason of which said premises, the proving of the said will of the said *Gardiner*, and the granting of administration of all and singular the goods and chattels, &c., of the said *Gardiner*, in respect of the said sum of 2,000*l.* so received by the said defendants, of right belonged and appertained to, and doth still belong and appertain to the said

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Chapter of the collegiate Church aforesaid, and not to the said Archbishop of York; and the said letters testamentary produced here in Court, were void and of no effect against the said defendants, in respect of the said sum of 2,000*l.*; and this the defendants were ready to verify.

*Replication*.—That the said parish of *Southwell*, in the county of *Nottingham*, in the last plea mentioned, during all the time of the said residence and commorancy there of the said defendants, was and still is within the jurisdiction of the Archbishop of the province of *York*, in the same plea mentioned; and this the plaintiff prays may be inquired of by the country, &c.

The cause was tried before *Gaselee, J.*, at the last assizes, at *Nottingham*. It appeared that the deceased had *bona notabilia* at *Thurgarton*, within the province of *York*, and out of the peculiar of *Southwell*; but it was contended for the defendants that an administration ought to have been taken out in the peculiar of *Southwell*. It was in evidence that *Southwell* was within the jurisdiction of the Archbishop of *York*, and it appeared that the archbishop exercised authority from time to time by inhibition and relaxation (a). The defendant relied upon a bull of Pope *Alexander III.*, dated the kalends of August 1171, whereby he granted certain privileges to the Church of *St. Mary*, of *Southwell*, and other churches, as follows, "*Nihilominus etiam presentis scripti decreto sancimus ut ecclesiæ præbendarum et communionis ab omni jure et consuetudine episcopali liberæ sint, penitus et immunes, et in iisdem ecclesiis vobis liceat vicarios idoneos absque aliquâ contradictione instituere, sicut Eboracenses archiepiscopi et capitulum id vobis et predecessoribus vestris permisisse noscuntur, et in presentiarum in ecclesiâ Eboracensi et vestra pacificè observantur.*"

It was also in evidence, that when a person died with *bona notabilia*, within the peculiar of *Southwell*, that probate was granted out of the peculiar court.

(a) The inhibition suspending the powers of the peculiar, was as follows: "Edward, by divine providence, Lord Archbishop of *York*, &c., to our beloved the venerable the chapter of the collegiate church of the blessed virgin *Mary* of *Southwell*, in the county of *Nottingham*, and our diocese of *York*, or your vicar-general in spiritualities, greeting:—Whereas we intend, God willing, to visit our diocese and jurisdiction of *York*, and therein your peculiar jurisdiction of the collegiate church aforesaid, and the people and clergy respectively living within the same, as well in places exempt as not exempt: therefore, by the tenor of these presents, we inhibit you, jointly and severally, and by you, or either of you, we will and command to be speedily inhibited, all and singular the canons and prebendaries, and the officers or commissioners of the said canons and prebendaries, and all other persons exercising ecclesiastical jurisdiction within your peculiar jurisdiction of the collegiate church aforesaid, that neither you nor they, nor any of them, from the day of the receipt of these presents, pending our primary metropolitan visitation, do presume to visit the churches or other ecclesiastical places, or the clergy or people within your said jurisdiction, or exercise those things which belong to ecclesiastical jurisdiction in any manner whatever, or do any thing else to the prejudice of our visitation."

The relaxation which restored the authority of the peculiar was as follows: "Edward, by divine Providence, Lord Archbishop of *York*, to our beloved in Christ, &c., health, grace, and benediction:—Whereas we lately, by our metropolitan authority, purporting to visit our whole jurisdiction, as well in places exempt as not exempt; and the clergy and the people of the said jurisdiction having inhibited and commanded you, that you should not presume to visit the churches or other places, or the clergy or the people of the said jurisdiction, or correct or reform any faults or excesses, or in anywise exercise those things which belong to ecclesiastical jurisdiction, or in any manner attempt to do any thing to the prejudice or disadvantage of our ordinary visitation, as by our letters inhibiting, will more fully and evidently appear; we being willing, for some certain causes as in this behalf favourably moving, now to restore your former authority, have thought proper that our visitation in and throughout your whole jurisdiction aforesaid, shall be relaxed and dissolved, and we wholly and absolutely relax and dissolve our said visitation, and give to you our former power and authority in the Lord by these presents; so that you and your officers may truly and lawfully proceed in all things, any inhibition hereof from us or by our authority to the contrary, in anywise notwithstanding."

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The learned judge was of opinion that, at all events, the administration of the Archbishop of York, was only voidable, and not void. The jury found that *Southwell* was within the jurisdiction of the Archbishop of York, and gave a verdict for the plaintiff.

Amos obtained a rule *nisi*, in pursuance of leave reserved, to enter a non-suit upon the second issue, upon the ground that a prerogative administration was not sufficient where there are *bona notabilia* within a diocese, and also in a peculiar, *Price v. Simpson* (b); and that the administration taken out was altogether void.

Wilde, Serjt., *Adams*, Serjt., *Hill*, and *Humfrey*, shewed cause.—The issue raised is, whether the peculiar was within the jurisdiction of the Archbishop of York, and that fact having been found by the jury, the question as to whether the prerogative administration is void or voidable does not arise. *Price v. Simpson* (b), is also reported as *Prince's* case, 5 Rep. 30, and in *Anderson's* Rep. part 2, folio 132. But in neither of those books is the point reported, upon which the defendants mainly rely, viz., that when there are goods in a diocese and also in a peculiar, it is then necessary that an administration should be taken out of the peculiar court. It is therefore fair to presume that the report in *Cro. Eliz.* is erroneous, and the two latter cases shew that, at all events, the administration granted by the archbishop was only voidable, as is also held in *Com. Dig. Administrator*, B. 2. *Needham's* case, 8 Rep. 135.

The nature of peculiars was considered by *Sir John Nicholl*, in *Parham v. Templer* (c). He says, "Now the very term peculiar, *ex vi termini*, supposes an exemption from ordinary jurisdiction. And *Ayliffe* in his '*Prærogative Juris*,' heads his chapter 'of Peculiars or exempt Jurisdictions,' as if these were synonymous terms." He goes on to say, "Peculiars are called exempt jurisdictions, not because they are under no ordinary, but because they are not under the ordinary of the diocese, but have one of their own:" and the learned judge, after describing the various kinds of peculiars, goes on to say, "This is not a royal peculiar, but is one of the ordinary kind, which is as liable to the metropolitan jurisdiction as a bishop is to his archbishop. So again in cases of wills and administrations, where there are *bona notabilia*, peculiars are considered as separate jurisdictions, and not as being part of the diocese. For if there be *bona notabilia* in a diocese under the ordinary jurisdiction of the bishop, and also in a peculiar in that diocese, or in two peculiars situated in the same diocese, in such case the probate belongs to the Archbishop. It is expressly so laid down by *Gibson*, *Swinburne*, and in a case in *Siderfin*; and it is declared by those authorities, that, in such case, probate shall be granted, not by the diocesan but by the Archbishop, because such peculiars are exempt from the jurisdiction of the diocesan." *Lawton on Bona Notabilia*, 91, shews the practice which is uniformly followed, when there are *bona notabilia* in a peculiar. It is clear that the archbishop has exercised his authority by inhibition, and if so, it is fair to presume that during that period, at least, a prerogative probate would be sufficient (d).

(b) *Cro. Eliz.* 719.

(c) 3 Phillimore, 245.

(d) It was a disputed fact, whether it was

in evidence that the Archbishop granted administration of goods within the peculiar, whilst the inhibition was in force.

Spankie, Serjt. and *Amos*, *contrà*.—The jurisdiction which the archbishop exercises over a peculiar within his own jurisdiction, and over one in the diocese of another bishop is different, for in that respect an appeal would follow the nature of the peculiar. *Jones v. Jones* (*f*). [TINDAL, C. J.—You do not raise that distinction here.] The rule laid down in *Price v. Simpson* (*g*), is decisive, to shew that an administration ought to have been taken out of the peculiar court. To the same effect is 4 *Burn. Eccl. Law*, 191. 1 *Gibson's Codex*, 472. *Tol. Exors.* 52. *Vin. Abr.* tit. *Executor's, Administration*, (G.) 76. *Com. Dig. Administrator*, (B. 3.) It is said that the prerogative administration is only voidable. But if it clearly appears that the archbishop has been exercising jurisdiction without having authority to do so, the Court will take notice of it, *Smithwick v. Bingham* (*h*). The authorities cited by Sir *John Nicholl*, in *Parker v. Templar* (*i*), do not bear out his proposition, for no authority is to be found in *Gibson*, *Swinburne*, or *Siderfin*, which will warrant the conclusion drawn.

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TINDAL, C. J.—The question for our consideration is, whether on the face of these pleadings, or by the evidence, the administration in right of which the plaintiff sues, appears to be void, or merely voidable. The distinction is well known. If the administration is void, the courts of common law will take notice of the defect, and will not allow the plaintiff to recover; but if it is only voidable, then the instrument is valid in a court of law, until it is repealed or declared void by some ecclesiastical authority. The question therefore is, whether we can see by the decided cases, or upon the reason of the thing, that this is a void instrument. It is a metropolitan administration, taken out of the Prerogative Court of the Archbishop of *York*, and the objection is, that as the debtor lived within the peculiar of *Southwell*, when the debt was contracted, and as the deceased had also effects within the province of *York*, that two administrations ought to have been taken out, one from the peculiar, and also one from the Archbishop's Court. Now until the administration, which has been taken out, is impugned by matter of law, we are bound to give credence to it, and are not of our own authority to say, that the administration has been granted improperly. *Price v. Simpson* (*k*), is relied on in support of the objection. This case is also reported in 5 Rep. 30, as *Prince's* case; and in *Anderson*, part 2, folio 132; and it is not immaterial to observe that the point which has been so much relied on, namely, that where the party had goods in a diocese, and also in a peculiar, two letters of administration should be granted, is only to be found in the case as it is reported by *Croke*. The question, as reported in *Croke*, was whether certain lands passed to the plaintiff, under a sale made by the administratrix, and the first resolution disposes of the case, as it was held that the sale was not valid, and the case was in fact then at an end; and it is a common observation, that when the principal question is disposed of, the dicta upon other points referred to, are not entitled to the same degree of consideration, as the decision upon the very point in dispute. The second resolution refers merely to the assent of the parties, *durante minoritate*, and is not material to the present question. The third is, "that there should be two letters of administration granted, for the arch-

(*f*) Hobart, 185.

(*g*) Cro. Eliz. 719.

(*h*) Moore, 693.

(*i*) 3 Phillimore, 245.

(*k*) Cro. Eliz. 719.

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bishop shall not have any prerogative here, because this peculiar was first derived out of his jurisdiction." But in the same case, reported by Lord Coke, he says, that these points were resolved. "And in this case it was said, that judgment was given in the King's Bench, *Pascha*, 22 *Eliz.*, between *Vere* and *Jefferies* (1), that where one hath goods only in an inferior diocese, yet the metropolitan of the same province, pretending that he had *bona notabilia* in divers dioceses, committed administration, this administration is not void, but voidable by sentence, because the metropolitan hath jurisdiction over all the dioceses in his province, and therefore it cannot be void, but voidable by sentence; but if an ordinary of a diocese commits administration of goods, when the party hath *bona notabilia* in sundry dioceses, such administration is merely void, as well as to goods within his own diocese as elsewhere, because he can by no means have jurisdiction of the cause." The third resolution therefore carries the matter no further than was provided for by the common law, and the same doctrine is laid down in a book of high authority, *Com. Dig.* tit. *Administration*, B. 6; where it is said, "if the probate be by a bishop or other inferior judge, when it does not belong to him, it is void. If it be by the metropolitan when it does not belong to him, it is only voidable." And he cites this very case from Lord Coke.

The utmost effect, therefore, of *Price v. Simpson*, is that if it appears that the archbishop ought not to grant the administration, it is merely voidable and not void. If it were a doubtful question, the course and practice of the court is material; and the evidence here was, that the archbishop had *some* jurisdiction, for he issued inhibitions; and it was also said that he granted administrations, which would affect goods in the peculiar, as well as those in the other parts of the diocese. This rule must be discharged.

PARK J.—The main question is whether the administration is void or merely voidable, and it is a very remarkable circumstance, that the point upon which the defendant mainly relies, is only reported in *Croke*; and that the other two reports in 5 *Coke* and *Anderson*, are altogether silent upon that part of the decision. This is the more singular, as *Vere v. Jefferies*, which is referred to by Lord Coke, was decided twenty years before, in which the distinction is taken between probate granted by the ordinary, and by the metropolitan. A case was cited by Mr. *Humfrey*, from the same report, *Needham's case* (m), where the old case is again referred to, and the same doctrine is advanced. These authorities are so strong that I cannot place reliance upon the report in *Croke Elizabeth*; and I do not by any means say that this is an invalid administration, especially remembering the judgment of Sir *John Nicholl*, which has been read during the argument. I am also influenced by the proof of the issuing of the inhibition by the archbishop, and it would be very inconvenient if he could not grant administration of goods left in the peculiar, during the period in which it remained in force.

GASELEE, J. concurred.

BOSANQUET, J.—The question is not whether two administrations might or ought to have been granted, but whether the prerogative administration is void or voidable. The only authority which shews that two administrations

(1) 8 Rep. 135 a.

(m) 8 Rep. 268.

ought to have been granted, is the case of *Price v. Simpson, Cro. Eliz.*; but the same case is reported in two other books, and this point is not touched upon. An authority from *Moore*, has also been cited for the defendant, but that is directly contrary to *Vere v. Jefferies*.

To what extent the jurisdiction of a peculiar resembles that of a bishop within his diocese, I do not say, but there is certainly a strong resemblance. Without offering any opinion as to whether two administrations were necessary, I think this verdict ought not to be set aside, upon the ground that the administration which has been granted is absolutely void.

Rule discharged.

WADDILOVE v. BARNETT.

Nov. 16th.

ASSUMPSIT for use and occupation. Plea, non-assumpsit. At the trial before *Vaughan, J.*, an agreement, not under seal, dated 19th of *December, 1826*, was proved, whereby the plaintiff agreed to let the premises to the defendant. The plaintiff also proved, that he had distrained and recovered rent which had become due after the commencement of the tenancy. The defendant shewed, that, on the 22nd of *December, 1829*, he had received a notice from the mortgagee of the premises, requiring him not to pay the rent to the plaintiff, but to pay it to him, the mortgagee; and it appeared that the premises had been mortgaged before the date of the agreement. It was not shewn whether the rent claimed at the trial accrued due before or after the time when the defendant received the notice from the mortgagee. The learned Judge was of opinion that the facts proved by the defendant were not admissible in evidence, under the plea of non-assumpsit. Verdict for the plaintiff for 81*l.* 5*s.*

In assumpsit for use and occupation, under a plea of non-assumpsit, the defendant may shew that he has received a notice to pay rent to a mortgagee of the premises. But if the action be for occupation enjoyed before the notice was received, then such a defence must be specially pleaded.

Bompas, Serjt., obtained a rule nisi for a new trial upon the ground that the evidence for the defendant ought to have been received.

Bushy shewed cause.—Upon the true construction of the new rules of pleading, this evidence was inadmissible (a). The defence ought to have been pleaded.

(a) By Reg. Hil. T. 4, W. 4, 1 Assumpsit.—“In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non-assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

Ex. gr.—In an action on a warranty the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on re-

quest, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

In an action of indebitatus assumpsit, for goods sold and delivered, the plea of non-assumpsit will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which makes such receipt by the defendant a receipt to the use of the plaintiff.

In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void

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The defendant entered into possession of the premises under a written agreement, which is positive in its terms and express in its stipulations, and so far the plea of non-assumpsit was completely answered. If, therefore, the defendant desired to confess and avoid the demand, it is manifest by the express directions of the new rules, that a special plea was necessary. The defendant having submitted to a distress, thereby recognized the tenancy, *Panton v. Jones* (b); and the contract being admitted, he cannot shew a new taking in direct opposition to it. The effect of the notice from the mortgagee is not to put an end to the tenancy, but merely relieves the defendant from a liability to pay the plaintiff. So in the example put of a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach. [TINDAL, C. J.—That is an express promise. Here it is an implied promise. You must prove a use and occupation by the leave of the plaintiff, but the evidence on the other side shews that it was by the permission of the mortgagee.] *Edmunds v. Harris* (c) decided, that to entitle a defendant to shew that the time of credit had not expired, he must plead it specially; and in *Barnett v. Glossop* (d) it was held that a defence that a copyright was not assigned by writing must also be pleaded specially.

Bompas, Serjt., *contra*.—The effect of the mortgage was, to take the premises entirely out of the power of the mortgagor, and they become the property of the mortgagee. *Moss v. Gallimore* (e), where Lord Mansfield says, "the mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases." The plea operates as a denial of the facts from which the implied promise arises, and the examples given by the new rules, shew that this evidence was admissible. In *Cousens v. Paddon* (f) it was held, that under this plea the defendant may shew that the goods were not of that description, or the labour of that quality stipulated for. *Barnett v. Glossop* is distinguishable from the present case.—

Cur. adv. vult.

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TINDAL, C. J., after stating the facts of the case, proceeded as follows:—Whether the evidence ought to have been admitted, is the only question that has been raised before us. It does not appear distinctly upon the evidence, whether the money claimed by the plaintiff, for the use and occupation, became due from the defendant before or after the notice given by the mortgagee; or whether part became due before, and part after the delivery of such notice: and as the question appears to us to call for a different answer, according to the time when the rent became due, it will be right to consider it, first, upon the supposition that all the rent accrued due after

or voidable in point of law, on the ground of fraud, or otherwise, shall be specially pleaded; *ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepre-

sentation, concealment, deviation, and various other defences must be pleaded.

(b) 3 Camp. 372.

(c) 2 Ado. & Ellis, 414. The authority of this case is doubted in *Taylor v. Hilary*, 1 Gale, 23.

(d) 1 Bing. N. C. 633, S. C. Ante. 94.

(e) Doug. 283.

(f) 1 Gale 309.


the notice given; and next, that all or part of the rent became due before the notice.

That the state of facts offered to be proved would have constituted a defence in law to the plaintiff's action, under the plea of *non-assumpsit*, before the new rules were in force, may be considered as decided by the case of *Pope v. Bigg (g)*. In that case it was held, that as to all the rent due, both the arrears before the notice given, and the rent which fell due after such notice, the occupier of the land who had been let into possession by the mortgagor, and held the land by his permission, might discharge himself as to him by payment to the mortgagee, after such notice, under the plea of *nil debet*. And indeed, in the course of the argument before us, the objection has not been, that the tenant cannot be allowed to set up this defence on the ground that he would be disputing his landlord's title, but simply on the ground that the defence ought to have been specially pleaded; whereas, it is manifest, that if the defence itself was inadmissible on the principle above referred to, it would be equally inadmissible, whether put upon the record or only given in evidence.

Now the terms of the rule in question, so far as it applies to the present case, are these: "the plea of *non-assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." And we are of opinion, that, with respect to the rent which becomes due for use and occupation subsequent to the notice given by the mortgagee, the evidence offered was admissible, inasmuch as it amounts to a denial of a matter of fact stated in the declaration from which the promise in law is implied, and to nothing more.

The action is brought for a reasonable satisfaction given by the statute 11 Geo. 2, c. 19, s. 14, for the use and occupation of land, held and enjoyed by the defendant. It is therefore a matter of fact stated in the declaration, from which the promise arises by operation of law, "that the defendant held and enjoyed the premises in question by the permission or sufferance of the plaintiff." For, as to the circumstance on which considerable stress was laid by the plaintiff's counsel, in the course of the argument, that the defendant entered under an express agreement in writing, it appears to a majority of the judges that it makes no difference in the application in the rule of pleading, for it is only one mean of proof, amongst many others, that the occupation was by the permission of the plaintiff. But from the moment the mortgagee gave notice to the defendant that the future rents were to be paid to himself, it follows, from the relation between mortgagee and mortgagor, so fully explained in the case above referred to, that the defendant ceased to occupy by the permission and sufferance of the mortgagor; and that he began to hold and enjoy by the permission and sufferance of the mortgagee. The mortgagee might, at any time during the occupation, without giving any notice, have ejected the defendant from the possession; and the effect of that notice is, that a new tenancy is created between the occupier and the mortgagee. The notice therefore affords proof that the subsequent holding is not by the permission of the plaintiff, as alleged in the declaration, but by permission of the mortgagee; and such holding by permission of the mortgagee is not a

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confession and avoidance that he held by permission of the mortgagor during the same time for which the rent became due; it is an allegation inconsistent therewith, and amounts to a denial of it: and it is upon that principle we hold the evidence admissible under the present plea. If, therefore, all the rent had become due after the delivery of the notice, we should have held the evidence an answer to the action. But if part became due before, we think the same construction of the rule of pleading does not apply to such arrears already due. For as to those arrears the occupation has already taken place; and such occupation was, in fact, by the permission and sufferance of the plaintiff, under whom the defendant was let into possession. The mortgagor had a right of action against the defendant up to the time when the notice was given; and it seems to us to be difficult to maintain, that, because the mortgagee afterwards interferes and requires the rents already due from the occupier to be paid to him, the character and consequences of this by-gone occupancy can thereby be altered, or that this right of action which has already vested in the plaintiff can thereby be taken away. As to this by-gone rent, we think this evidence does not amount to a denial of the allegation that the occupation was by the plaintiff's permission, but to a confession and avoidance only, viz., that the defendant had occupied by permission and sufferance of the plaintiff, who was mortgagor in possession, and that after the rent in question became due he received a notice from the mortgagee (to whom the mortgagor was only a receiver in point of law), requiring him to pay over the rent to him the mortgagee, and thereby had determined the authority of the plaintiff to receive the rent. With respect, therefore, to so much of the rent, we think there is no answer on the present state of the pleadings. On the whole, therefore, the rule for a new trial must be made absolute; but the necessity of a new trial may possibly be avoided by the arrangement of the parties, to whom the real state of the facts is well known.

Rule absolute.

Jan. 18th.

GRACE v. MORGAN.

In an action for a malicious distress, the plaintiff cannot recover his extra costs as between attorney and client, incurred in an action of replevin which plaintiff had brought to recover the goods distrained.

THIS was an action for taking a malicious and excessive distress, tried before *Littledale, J.*, at the last assizes for *Surrey*. It was in evidence that the plaintiff had previously brought an action of replevin, to recover the goods distrained, which had been stayed by consent between the parties. The plaintiff having proved his case, the jury returned a verdict for 20*l.* 12*s.*, which included the costs of the replevin suit, as taxed by the officer of the court, between the parties, but did not include the extra costs as between attorney and client which were paid by the plaintiff to his attorney.

S. Hughes, in pursuance of leave reserved by the learned judge, obtained a rule *nisi* to increase the verdict by the amount of the extra costs.

Wallinger showed cause. The extra costs cannot be recovered. The right to recover extra costs was considered in *Hodges v. Earl of Lichfield*. (c)

(a) 1 Bing. N. C. 501; S. C. *ante*, 43.

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There the vendor of an estate had filed a bill in equity against the vendee to compel a specific performance of the contract, and the bill being dismissed with costs, the vendee received taxed costs; and it was held in an action brought by the vendee against the vendor, to recover damages for not making a good title, that the extra costs reasonably incurred by the vendee as between solicitor and client, in defending the suit in equity, were not recoverable. In *Sinclair v. Eldred* (b), and *Webber v. Nicholas* (c), extra costs were held not to be recoverable. *Jenkins v. Biddulph* (d), is quite in point with the present case. There it was held, that, in an action against the sheriff for a false return, extra costs, incurred in setting aside an outlawry, could not be recovered.

Platt and Hughes, contra.—When one commits a wrong against another, the law obliges the wrong-doer to give a full indemnity for the consequences of his act. It operates like a contract of indemnity. Here the plaintiff was compelled to bring an action of replevin to recover his goods; but in *Hodges v. Earl of Lichfield* (e), the filing a bill in equity was one degree removed from the ordinary course of transactions of that kind; and that distinction is taken by Tindal, C. J., in giving judgment. *Sandbach v. Thomas* (f) is exactly in point. That was an action for maliciously holding the plaintiff to bail: it was objected that the plaintiff was not entitled to recover beyond the taxed costs in the action; but Lord Ellenborough, C. J., said—"If by your act you subject a party to a legal liability to pay a sum to another, you must indemnify him against such expenses: if it were otherwise, it would come to this, that an attorney could not maintain an action against his client for the extra costs." In *Nowell v. Roake* (g), costs in error as between attorney and client were allowed in an action for mesne profits, as part of the damages which the plaintiff had sustained."

Curr. adv. vult.

TINDAL, C. J.—This was an action on the case, brought against the defendant for a vexatious and excessive distress; and the only point argued before us has been, whether the plaintiff should be at liberty to add to the damages given by the jury, the amount of the extra costs in a former action of replevin, which the plaintiff had brought in respect of his goods distrained, and in which the proceedings had been stayed by consent, and the amount of the taxed costs had been received by the plaintiff from the defendant before the present action was commenced.

It has been argued, that, upon general principle, the plaintiff is entitled to a complete indemnification for all the necessary and immediate consequences of the wrongful and vexatious act of the defendant; and that it is impossible to say that he receives such indemnity if he is obliged to bear the loss of those costs which were necessarily expended by him in prosecuting that suit, but which have not been allowed, as between himself and the adverse party, by the taxing officer.

But whatever might have been our opinion if the matter were *res integra*, we feel ourselves bound by the decision of this Court in the case of *Jenkins v.*

(b) 4 Taunt. 7.
 (c) 1 Ryan & Moody, 420.
 (d) 4 Bing. 160.

(e) 1 Bing. N. C. 501; 8. C. ante, 43.
 (f) 1 Stark. N. P. C. 306.
 (g) 7 B. & Cress. 404.

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Biddulph (g). In that case, which was an action against the sheriff for a false return of *non est inventus*, in consequence of which the plaintiffs were outlawed, this Court held that they were not entitled to recover the extra costs of the outlawry; and the taxed costs of the outlawry having been paid before the action was brought, a nonsuit was directed to be entered.

It may be observed that all the cases relied on by the plaintiff, as authority that the full costs of the former action are recoverable in a subsequent suit for vexatiously prosecuting the former action, are cases where there has been no taxation of costs in the former action; such as ejectment, where the judgment was obtained by default against the casual ejector; or formedon, where there are no costs given in the action itself; or upon a writ of error, where no costs are given; in which cases the plaintiff must recover his full expenses, if he is entitled to recover any.

But in ejectment, where the action has been defended, and the costs taxed, he is not allowed to recover the extra costs in a subsequent action. *Doe v. Davis (h)*.

There is only one case that has been cited in opposition to the principle above laid down, namely, that of *Sandbach v. Thomas (i)*, but whatever respect is due to the opinion of the very eminent judge who tried the cause, we cannot think it sufficient to outweigh the authorities to which we have referred.

Rule discharged.

(g) 4 Bing. 160.
 (h) 1 Esp. 358.

(i) 1 Stark. N. P. C. 306.

Jan. 29th.

SYMES v. GOODFELLOW.

In an action for board found the defendant's wife, and non-assumpsit pleaded, a legal arbitrator received evidence that the wife had been guilty of adultery, and made an award for the defendant: upon an application to set aside the award, upon the ground that the defence ought to have been specially pleaded, the Court refused to interfere.

THIS was an action of assumpsit for board and lodging found and provided for the defendant's wife. *Plea*, Non-assumpsit. The cause was referred by order at nisi prius to a barrister, who made an award in favour of the defendant, it having been proved, after an objection taken to the admissibility of the evidence, that the plaintiff was cognizant that the wife had been guilty of adultery. *Crowder* obtained a rule nisi to set aside the award, upon the ground that the evidence of adultery by the wife, was inadmissible under the plea of non-assumpsit.

Wilde, Serjt., showed cause.—It is not necessary to consider whether this was a defence which ought to have been specially pleaded, for the admission of the evidence was a question of law entirely for the discretion of the arbitrator. The rule that the arbitrator's decision is final, is now extended to the case of a lay arbitrator. *Jupp v. Grayson (a)*.

Crowder, contra.—A foreign issue has been raised which was never referred, and the plaintiff was taken by surprise; therefore the arbitrator has exceeded his authority, and in that case, the Court will interfere.

TINDAL, C. J.—In whatever way the case is put, it is the same thing whether the objection arises on the admission of improper evidence or from

(a) 1 Cr. M. & R. 523.

the state of the pleadings. It may not be so clear that this ought to have been pleaded; and if a doubtful point arises, the Court will not interfere with the discretion of the arbitrator, who was in this case a man of law, and his law must be taken for better and for worse.

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BOSANQUET, J.—The arbitrator has not awarded upon anything which was not in the cause.

The other judges concurred.

Rule discharged.

CHAPMAN v. GATCOMBE.

Jan. 28th.

ASSUMPSIT for tithes arising from land in the occupation of defendant.

The cause was tried before *Coleridge, J.*, at the last assizes for *Somerset*. It was in evidence, that one *William Gatcombe* was formerly the owner in fee of the lands out of which the tithes issued, and that, in 1815, he purchased the tithes from the lay impropiator. In *April*, 1816, the defendant married *Joseph Gatcombe*, the son of *William Gatcombe*, who, by a deed of lease and release, conveyed the same lands to certain trustees, to the use of his said son *Joseph* for life, with remainder to the use of the defendant, in bar of dower. The following general words followed the description of the parcels of land described in this conveyance, "Together with all houses, out-houses, edifices; buildings, ways, paths, passages, waters, watercourses, easements, profits, commodities, advantages, emoluments, *hereditaments and appurtenances whatsoever, to the said premises belonging, or in anywise appertaining*, and the reversion and reversions, &c., and all the estate, right, title, interest, use, trust, possession, freehold, inheritance, reversion, possibility, property, challenge, claim, and demand whatsoever, either at law or in equity, of him the said *W. Gatcombe*, therein or thereto, or to any part thereof. The plaintiff shewed that he was, in right of his wife, the heir of *W. Gatcombe*, who died in 1817. For the defendant it was contended, that, upon the death of her husband in 1820, she became entitled to the tithes under the general words contained in the deed of 1816. The learned judge was of opinion that the tithes did not pass by that deed, and a verdict was found for the plaintiff.

The owner in fee of lands, who had purchased the tithes issuing thereout of the lay impropiator, by deed, conveyed the lands in fee, "together with all ways, easements, profits, emoluments, *hereditaments*, and appurtenances whatsoever to the same premises belonging or appertaining, and all the estate, right, title, interest, freehold, inheritance, possibility, property, claim, and demand of him the said *W. G.* (the grantor,) therein or thereto:"—*Held*, that tithes did not pass by this conveyance.

Erle obtained a rule *nisi* to set aside the verdict, and to enter a nonsuit, in pursuance of leave reserved.

Crowder and *Kinglake* shewed cause.—The tithes are a distinct inheritance from the land out of which they issue, and unless they are expressly named in the grant, they will not pass. Thus, in *Shep. Touch.* 78, it is said, "But if the exception be of another thing than the thing granted, as if one grant a manor or land, excepting 12d. or excepting the tithes, these exceptions are void." It is true it may be said that tithes are an hereditament, but the word "hereditament" used in the conveyance refers to the land which is before described. In *Bone v. Bishop of Norwich* (a), it is said, that tithes, being spiritual things, cannot pass as an appurtenance to a grant, for they are

(a) 1 Eagle & Y. 331.

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of distinct natures. In *Priddle and Napper's case* (b), it is said, "*Decima pars*, which we call tythes, is an ecclesiastical inheritance collateral to the estate of the land, and, of their proper nature, due only to an ecclesiastical person by the ecclesiastical law, and, therefore, no unity of possession can extinguish or suspend them, but they, notwithstanding any unity, remain *in esse*, so that they may be demised or granted to any spiritual man, notwithstanding any such suspension." And *Stile and Miller's case* (c), is, "Tithes are not things issuing out of lands, nor any secular duty, but spiritual, and if the parson doth release to his parishioner all demands in his lands, his tithes thereby are not extinct." *Phillips v. Jones* (d), is directly in point. There the Court said "that the release did not convey all the hereditaments described in the lease, but only the hereditaments belonging to the messuages and lands before described in the release itself, and that tithes were not hereditaments belonging to land, but were separate subject of tenure, and must be held by a different title." And *Richards, B.*, in *Attorney-General v. Lord Eardley* (e), observes, "The Crown by this instrument passes all these parcels of lands and also all and singular other grounds, lands, tenements, and hereditaments, parcel of the 10,000 acres in *Peterborough Level*. Those well-known words could not, as I conceive, *per se*, pass tithes, which, no doubt, are a particular species of property, for they do not belong, nor are they appurtenant to land: they are collateral to the land, and are quite distinct from it." In *Eagle on Tithes*, 28, it is said "that tithes are so distinct from the land that they are freehold estates, whatever may be the tenure of the lands in respect of which they are payable; and, therefore, the proprietor of tithes of the annual value of 40s., arising out of copyhold lands, is entitled to vote as a freeholder at county elections." *Carey's case* (f) shows that tithes are parcel of a rectory.

Erle, contrd.—The question is, what was *William Gatcombe's* intention when he conveyed the premises. There can be no doubt but that he intended to pass the tithes. It is not contended that they would pass as appurtenant to the land, and therefore the authorities cited on the other side need not be impugned; but it is clear, upon taking the whole conveyance together, that the grantor intended to convey the estate in as full and ample a manner as he held it himself. He conveys "all his estate, right, title, interest, use, trust, possession, freehold, inheritance, reversion, possibility, property, challenge, claim and demand whatsoever, either at law or in equity, therein or thereto." Now, if the grantor had parted with the legal interest in the land before he made the settlement, the tithes would have passed. [*Tindal, C. J.*—Because the Court must have given some effect to the deed.] In *Dowse v. Reeve* (g), the proceedings in a recovery were amended by inserting the tithes arising out of certain lands, upon an affidavit which set out the vouchee's title to the tithes, and stating his intention to have passed all his interest in the premises; and it also appearing that the word "hereditaments" was in the deed to lead the uses. In *Ongley v. Chambers* (h), under a demise of the rectory of M., with the messuages, lands, &c., thereunto belonging, it was held that lands passed which had been acquired by the owners of the rectory before 1632, and which

(b) 11 Rep. 13 a.
 (c) 1 Leonard, 300.
 (d) 3 Bos. & P. 363.
 (e) 8 Price, 70.

(f) 1 Leonard, 281.
 (g) 2 Bos. & P. 578.
 (h) 1 Bing. 463.

had been always afterwards occupied with the rectory. The *Attorney-General v. Lord Eardley* (i) was a case between the crown and a subject; but here the rights of the crown are not at stake. *Norbury v. Meade* (j), where a grant of land was made by one who was also owner of the tithes, it was held that the land passed free from the payment of tithes.

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TINDAL, C. J.—The rule for entering a nonsuit must be discharged. The question is, whether the tithes passed by the conveyance by lease and release of 1816, because if they did pass, this action cannot be maintained. Looking at the deed and at the cases which have been cited, I am of opinion that the tithes did not pass. The definition of tithes, as stated in 11 Rep. 13, is “an ecclesiastical inheritance, collateral to the estate of the land, and of their proper nature due only to an ecclesiastical person, by the ecclesiastical law;” and although it appears from that case that they are an incorporeal hereditament, yet I do not think that there are any words sufficient to include them in this deed. The conveyance is of a house and certain lands, which are described, and then follows these general words,—“together with all easements, profits, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the same premises belonging or appertaining,” and the words “to the same premises belonging or appertaining,” overrules the word “hereditaments” as well as the other general words; the question, therefore, is, whether the expression “hereditaments to the same premises belonging or appertaining” will convey the tithes, for the general words which follow those already mentioned, do not carry the meaning of the grantor further.

It appears that the owner of the land had purchased the inheritance of the tithes, and at the time of making the conveyance in 1816, he had two separate inheritances, consisting of the land and the tithes; for it is clear, by the case in Moore, 50, sec. 151, that the union of seisin would not extinguish the tithes.

If, therefore, the tithes were not extinguished, they could not pass by the deed, unless they were conveyed by apt and proper words. There is a case of *Parkyns v. Hinde*, (k) which is very strong to show the strictness of the rule as to the conveyance of tithes. In that case the parson of B. leased all his glebe land for ninety-nine years, rendering 13*l.* 4*s.* rent for all exactions and demands, and then his successor sued for the tithes of the land, and it might have been thought that, as against the rector, tithes would not have been payable; but *Wray* said “the parson shall have tithes against his lessee, and the words here shall be no discharge; for these tithes arise and accrue after, and are not things issuing out of the land, but collateral, and due *jure divino*, and therefore cannot be discharged but by special words.” In *Carey's* case, (l) a man granted *situm Rectoria cum decimis eidem pertinent habend situm predict cum suis pertinentiis* for twenty years, and because the tithes were not expressly named in the *habendum*, it was objected that they did not pass for the whole term, but it was held that the tithes were parcel of the rectory, and, therefore, for the nearness between them, the tithes would pass, together with the rectory. In *Grubham v. Grate*, (m) where there was a lease of a chapel, with its appurtenances, it was held that the tithes were not appendant to the chapel.

(i) 8 Price, 39.

(j) 3 Bligh, 243.

(k) Cro. Eliz. 161.

(l) 1 Leon. 281.

(m) 2 Rolle's Rep. 150.

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These cases show how close and nice the Courts have been in considering conveyances of this species of property. *Bone v. The Bishop of Norwich*, (π) is a case which governs the present: there it was held, that tithes shall not pass as appurtenant to a grange, because they are of several natures, except, as *Winch* said, that the grange is the glebe, for if it is, then the rectory may pass by this name. In *Lord Norbury v. Meade*, (ο) the circumstances of the case leave it open to an inference, whether some other deed was not passing in *Lord Redesdale's* mind: he says, "It appeared from the evidence, that both the rectory and the lands came to *Sir John Packington*, and that *Sir John Packington* having the rectory, granted the lands. When he conveyed the lands, could he not convey them as he held them. Is it probable that he conveyed them, subject to tithes, holding them himself not subject to tithes, though he might, if he thought fit, have made a separate demise of the tithes and of the land." It has been urged, that we ought to consider the situation and intention of the grantor when he executed the deed; but it seems to me, that the cases are too strong to entitle the defendant to set aside this verdict.

PARK, J.—With the exception of the supposed opinion of *Lord Redesdale*, in *Lord Norbury v. Meade*, (ο) all the cases, from *Leonard* downwards, are uniform in holding, that by such a conveyance as the present, the tithes would not pass. There may be cases where the word hereditament may include tithes, but here it is connected with the expression "to the said premises belonging or appertaining."

GASELEE, J.—The cases are all one way, and I agree that this rule must be discharged.

BOSANQUET, J.—The question is, whether the tithes passed by the deed of 1816. There has not been such a length of enjoyment in this case as to warrant a presumption that there has been a separate conveyance of the tithes, which seems to me was the case in *Lord Norbury v. Meade*. (ο) There it appeared that the title to the tithes and the land was both originally in the crown, and both were conveyed to *Sir John Packington*, and from him to a party under whom the defendant claimed, by a conveyance in which the tithes were not mentioned, but the defendant and those under whom he claimed had been so long in the enjoyment of the tithes, that it was reasonable to suppose that *Sir John Packington* had made another conveyance. That is the interpretation which I put on the opinion delivered by *Lord Redesdale*. Did the tithes then pass by the deed? The word hereditaments is accompanied by other general words, which are all confined to the expression "to the said premises belonging or appertaining;" and it is quite clear that tithes do not appertain to the land. The other general words which follow are, "and the reversion, and reversions, and all the estate, right, title, interest, use, trust, possession, freehold, inheritance, reversion, possibility, property, challenge, claim, and demand whatsoever, of him the said *Gatcombe*, therein or thereto;" and these words are not applicable to the word hereditaments, but to the land, which is the

(π) *Winch*, 72.

(ο) 3 *Bligh*, 261.

subject of the conveyance. Under these circumstances, I am therefore of opinion, that the tithes did not pass by the deed.

Rule discharged.

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JAMES v. SALTER and another.

Jan. 28th.

REPLEVIN.—The declaration stated that the defendants, on &c., in the parish of *Uffculme, Devon*, in a certain dwelling-house, farm, &c., took goods and chattels, to wit, twenty ton weight of straw, &c., and unlawfully detained the same against sureties and pledges until &c., wherefore the said plaintiff saith that he was injured, and had sustained damage, &c.

The defendant *Salter* in his own right avowed, and the other defendant, as his bailiff, acknowledged the taking the goods and chattels in the declaration mentioned in the said dwelling-house, farm, &c., because they said that the said dwelling-house, farm, &c., in which &c., heretofore to wit, on the 10th of *November*, 1804, were the freehold premises of one *John Salter*, since deceased, late father of the said defendant *John Salter*, and continued so until and at the time of the decease of the said *John Salter*, and the taking the said goods and chattels as in the declaration mentioned, was done under and in pursuance of a certain power contained in the last will and testament of the said *John Salter*, deceased, bearing date the 3rd of *August*, 1800, for raising and paying a certain annuity, yearly rent, or sum of 30*l.*, given and bequeathed in and by the said will to the said defendant *John Salter*, and charged and chargeable on the said freehold premises of the said *John Salter*, deceased, and because the sum of 870*l.* arrears of the said annuity, yearly rent, or sum of 30*l.* accruing due at Christmas day last was behind and unpaid for the space of twenty days after the said Christmas day, and the same having been lawfully demanded and not paid, he, the defendant, *John Salter*, in his own right, well avowed, and the other defendant as bailiff to the said defendant *John Salter*, well acknowledged the taking the said goods and chattels in the declaration mentioned, to satisfy the said arrears, according to the purport, tenor, and effect of the said will, and this the said defendants were ready to verify, &c.

1. An annuity granted by will, no part of which has ever been received by the annuitant, is not within the provisions of 3 & 4 W. 4, c. 27, *secs.* 2 & 3; and, therefore, notwithstanding those sections, the arrears of the annuity may be recovered by distress, after a lapse of more than twenty years from the death of the testator.

2. An annuity was made payable by will, out of certain leasehold estates belonging to the testator, and if those should prove insufficient to satisfy the annuity then out of the testator's freehold estates:—*Held*, that as against the annuitant the will was not even *prima facie* evidence that the testator died possessed of the leasehold estates.

Pleas in bar.—*First*, that the said *John Salter*, deceased, in and by his said last will and testament, ordered and directed that the said annuity, or yearly rent, or sum of 30*l.* thereby bequeathed to the said defendant *John Salter*, should be paid and payable out of certain leasehold premises, to wit, his undivided moiety or halfendal of certain leasehold estates, called *Aston's* and *Chappel's*, otherwise *Elford*, and did in and by the said last will and testament charge the said leasehold estates to and with the payment of the said annuity, yearly rent, or sum of 30*l.* accordingly, and did thereby declare, that in case the said annuity, yearly rent, or sum of 30*l.*, or any part thereof, should, at any time, during the life of the said *John Salter* be behind and unpaid for the space of twenty days next after or over any or either of the periods or days of payment whereon the same was therein directed to be paid, being lawfully demanded, and then not paid, that then and so often it should and might be lawful to and for the said *John Salter* to enter upon the said premises, thereby charged

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with the said annuity, and to distrain for the same or so much thereof as should be so in arrear. And the said testator did thereby further declare, that in case the said moiety or halfendal of the said leasehold estates should prove insufficient to discharge the said annuity of 30*l.*, then that such deficiency should be made up out of the rents and profits of his, the said testator's, freehold premises, situate in the county of *Devon*; and the said testator did thereby also in that case charge the same and every part thereof to and with the payment of such deficiency, and give unto the defendant, *John Salter*, in case of the non-payment thereof, upon the said days or times therein before mentioned, such and the like powers of distress for the recovery of the arrears of the said annuity upon the said freehold premises, as was thereinbefore by him given to the defendant, *John Salter*, in that behalf, upon his, the said testator's, leasehold estate. And the said plaintiff further saith, that the said testator did not, by his last will and testament, further or otherwise charge the said annuity on his freehold premises or any part thereof. And that the said testator afterwards, to wit, on the 1st day of *May*, 1805, died possessed of the said moiety or halfendal of the said leasehold estates in the said will mentioned, without revoking or altering his said will, and that the said moiety or halfendal of the said leasehold estates in the said will mentioned, at the time of the decease of the said testator was, and from thenceforth and hitherto remained and continued and still is sufficient to discharge the said annuity, yearly rent, or sum of 30*l.* in the said will mentioned. And this he, the said plaintiff, was ready to verify, &c.

Second Plea.—And for a further plea to the said avowry and cognizance, the plaintiff saith, that the said distress in the said avowry and cognizance mentioned, was not made at any time within twenty years next after the time at which the right to make a distress for arrears of the said annuity, yearly rent, or sum of 30*l.*, first accrued to the said defendant, *John Salter*. And this he, the said plaintiff, was ready to verify, &c.

Replication to the first Plea.—The defendants say, that the said testator did not die possessed of the said moiety or halfendal of the said leasehold estates or any part thereof, in manner and form alleged.

To the *second Plea.*—So far as the same relates to the 585*l.*, (part of the money in the avowry and cognizance mentioned,) that the said distress was made within twenty years next after the time at which the right to make a distress for the said sum of 585*l.*, and every part thereof, being arrears of the said annuity, yearly rent, or sum of 30*l.*, first accrued to the said defendant *John Salter*; and as to the residue of the said *second* plea, so far as the same relates to the residue of the money in the avowry and cognizance mentioned, the defendants relinquished their avowry and cognizance, and prayer of judgment, so far as the same relate thereto.

At the trial before *Gurney B.*, at the last assizes at *Exeter*, the plaintiff produced the probate of the will of *John Salter*, who died in 1804, whereby it appeared that the annuity was bequeathed to the defendant, in the terms stated in the *first* plea, viz., out of the leasehold estates in the first instance, and out of the freehold estates, if the leasehold should prove insufficient to satisfy the annuity; no evidence was given that the testator was possessed of the leasehold estates at the time of his death, nor did it appear that any portion of the annuity had ever been paid. The learned judge was of opinion, that the will was, of itself, *prima facie* evidence that the deceased died possessed

of the leasehold estates, and being also of opinion that the plaintiff was entitled to succeed on the second issue, under Statute 3 & 4 W. 4, c. 27 (a), a verdict was found for the plaintiff on both issues.

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Bompas, Serjt., obtained a rule *nisi* for a new trial, upon the ground that the production of the will was no evidence whatever to shew that the deceased died possessed of the leasehold estates, and that the Statute 3 & 4 W. 4, c. 27, offered no bar to the distress.

Erle shewed cause.—The verdict is right. The defendants claim the annuity under the will, and the testator's statement that he was possessed of the leasehold estates is *prima facie* evidence against them. *Ivatt v. Finch*, (b).

(a) By Stat. 3 & 4 W. 4, c. 27, sec. 2, it is enacted, that after the 31st day of December 1833, no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.

Sec. 3. That in the construction of this act the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned, (that is to say) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent, shall claim in respect of an estate or interest in possession, granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been

in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.

Sec. 15. Provided also, that when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not, at the time of the passing of this act, have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years, hereinbefore limited, shall have expired, make an entry or distress, or bring an action to recover such land or interest at any time within five years next after the passing of this act.

Sec. 42. That after the said 31st of December 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent.

(b) 1 Taunt. 141.

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It is like the case of a party claiming a legacy under a will, and it is a principle that a person who accepts a benefit under an instrument, must adopt the whole, giving full effect to its provisions, and renouncing every right inconsistent with it, *Dillon v. Parker* (c). In the absence therefore of any evidence, to shew the contrary, it must be taken that the testator died possessed of the leasehold estates, and then the freehold was not made liable to pay the annuity, until proof was given that the leasehold was insufficient.

Secondly.—The statute 3 & 4 W. 4, c. 27, was passed for the purpose of relieving the possessors of estates from dormant titles. The right to distrain accrued more than twenty years ago, and one distress must be made for the whole arrears due. *Wallis v. Savill* (d), *Hutchins v. Chambers* (e). By sec. 2 of the act, the right to distrain is limited to twenty years after the right first accrued, and here the right first accrued on the death of the testator, which is more than twenty years ago; the *second* section standing alone is conclusive, and it is not necessary to refer to the *third* section for the purpose of construing the *second*; but if that be not so, the case is clearly within the spirit and intention of the whole statute.

Bompas, Serjt., and Butt, contrà.—*First.* The evidence was insufficient to shew that the testator was possessed of the leasehold estate at the time of his death. The affirmative of the issue lay upon the plaintiff, and if the defendants were bound by the statement in the will, it would only shew that the testator was possessed of the leasehold estates when he executed it.

Secondly.—The statute does not apply to this case. No portion of the annuity has ever been received. It is admitted, that by the *first* section, the word rent in the *second* section includes an annuity; but the *second* section must be taken in connection with the *third*, and then it will appear that the legislature purposely intended to leave the right to distrain for an annuity circumstanced like this, exactly as it was before the passing of the statute. The *third* section directs when the right to distrain shall be deemed to have accrued; first—in cases where parties have been possessed and dispossessed; secondly—when the interest of a deceased person is claimed; and thirdly—when the party claims in respect of an estate in possession granted by any instrument *other than a will*. Neither of these cases are applicable to the present, nor are either of the others which are provided for in the subsequent part of the section. If it were necessary, the fifteenth section might also be relied upon to show that where the possession is not adverse at the passing of the act, the right shall not be barred until five years afterwards. [*Bosanquet, J.*—May it not be material to consider the effect of the *forty-second* section (f) as shewing the intention of the legislature.]—That ought to have been pleaded; but if it had appeared on the record, it would not apply to the present case.

TINDAL, C. J.—Two points have been raised for our consideration; one on the issue joined on the first plea in bar; the other on the Statute of Limitations, 3 & 4 W. 4, c. 27.

(c) 1 Swans. 396; 2 Wms. Exors. 887.
 (d) 2 Lutw. 1532.

(e) 1 Burr. 589.
 (f) See ante, p. 407.

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The first question arises out of a distress made by the avowant on certain freehold premises, in the county of *Devon*, and the defendant avows that he had an authority to levy the distress, for the arrears of an annuity given to him by the will of his father, *John Salter*, deceased. The first plea in bar is, that the annuity was first charged by the will, upon certain leasehold estates belonging to the testator, with a declaration that, if they should prove insufficient to discharge it, then that the deficiency should be made up out of the testator's freehold estate. The plea then goes on to say, that the testator died possessed of the leasehold estates, and that they were sufficient to discharge the annuity. The avowant replies that the testator did not die possessed of the leasehold estates, and that is the first issue raised upon these pleadings. It appears that no evidence was offered of the testator's actual possession of the leasehold premises at the time of his death; but it was contended for the plaintiff, that under the terms of the will, it must be taken as against the defendant who claimed under it, that he died possessed of the leasehold estates. I should have thought that a strong argument if the annuity had been charged on one species of property only; but here an alternative is given, and it does not appear to me that the conclusion follows which has been urged on behalf of the plaintiff; and I think some evidence ought to have been given to prove the issue. It would be going too far to say, that because a man was possessed of property when he made his will, that he must be taken to have possessed it at the time of his death.

The next issue is on the plea which states that the distress was made within twenty years after the right to distrain first accrued. This raises a very important question upon the Statute 3 & 4 W. 4. c. 27; namely, whether a party is at liberty to distrain for the last twenty years arrears of an annuity, which was granted more than thirty years ago, but which was never claimed until the distress was made. As far as I can understand the Statute, it does not seem to me to operate as a bar to the power of making the distress in such a case. It is clear by the *second* section of the Statute that no annuity can be recovered unless within twenty years after the right to distrain first accrued; but the *third* section explains when the right shall be deemed to have first accrued, and the case now before us does not fall within any of the predicaments specified in that section. As to the third, which relates to claims made in respect of an interest assured by any instrument, the case of a will is expressly omitted. I do not place any reliance upon the *fifteenth* section of the statute, as it is not brought before us upon the record. The rule must be made absolute.

PARK, J.—I should have wished to take further time to consider the point which has been argued, as to the construction of the statute, if I did not consider that the delay would be prejudicial to the parties; but, after giving my best attention to the arguments, I agree that the Statute is no bar in the present case, and that there should be a new trial. As to the other question, there was no evidence whatever to show that the testator died possessed of the leasehold estates.

GASELEE, J.—I have not been able to make myself sufficiently acquainted with the subject to give a decisive opinion upon the construction of the Statute. It seems to me to require great consideration, and the best course is to send

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the cause down for a new trial; and I should recommend the defendant to amend his avowries, as there is no allegation that there was no leasehold property, or that it was insufficient to pay the annuity.

BOSANQUET, J.—There has been no acknowledgment on the part of the defendant that the testator died possessed of the leasehold estates; and, as far as any thing appears on the pleadings, the defendant claims a right to distrain on the freehold estates. The other is an important question. It is admitted that if the first half-year's annuity had been received, the Statute would then have been a bar to the defendant's right to distrain. If the question had rested entirely upon the *second* section, it might have been doubtful whether the right to distrain was not barred after the lapse of twenty years from the death of the testator; but the *third* section goes on to show what cases are within the second section, and an annuity granted by a will, no part of which has ever been received, does not appear to be included.

Rule absolute.

Jan. 26th.

LA FOREST v. LANGAN.

Where the defendant admitted, in writing, that he owed the money sought to be recovered; but after action brought, pleaded a defence inconsistent with the admission, apparently for delay; the Court refused to treat the plea as a sham plea.

THIS was an action on a bill of exchange, and the defendant pleaded that the bill was outstanding in the hands of a third person.

W. H. Watson applied for a rule *nisi* to set the plea aside as being a sham plea. The plaintiff swears that he wrote a letter to the defendant demanding payment of the bill of exchange, and that he received a reply, in which the defendant admitted that he owed the money, and promised to pay it. It is clear, therefore, that this plea is put on the record merely for the purpose of delay. *Thomas v. Vandermoolen* (a), *Bones v. Punter* (b), *Bartley v. Godslake* (c), are authorities in support of this application.

Per Curiam.—To grant this motion would in effect be to try the cause upon affidavits, and by allowing such a practice we should get into considerable difficulties. The plaintiff must take an issue upon the plea, and go to trial.

Rule refused.

(a) 2 B & A. 197.
 (b) 2 B. & A. 777.

(c) 2 B. & A. 109.

Jan. 14th.

CANOT, Assignee of HUGHES an Insolvent, v. HUGHES, Administratrix.

After the death of an insolvent, certain wine-warrants, which had not been delivered to his assignee, were demanded of his widow and administratrix, who said that they were in the possession of her attorney. Held, not sufficient evidence of a conversion, to sustain trover to recover the warrants.

TROVER to recover certain wine-warrants. The cause was tried before *Tindal, C. J.*, at the sittings for *London* after *Michaelmas* Term. It was proved that the defendant was the wife and administratrix of the insolvent, who, at the time of his death, was possessed of the wine-warrants in question. The only evidence of a conversion was, that the plaintiff had demanded the

of his widow and administratrix, who said that they were in the possession of her attorney. Held, not sufficient evidence of a conversion, to sustain trover to recover the warrants.

warrants from the defendant, and that she replied that they were not in her possession, but in the hands of her attorney. No application was made to the attorney. The learned Judge held that there was not sufficient evidence of a conversion, and the plaintiff was nonsuited.

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Bompas, Serjt., moved to set the nonsuit aside. The warrants were the property of the insolvent's assignee, and the defendant had no right to keep them, nor had she any right to hand them over to the attorney; that was of itself a sufficient conversion. After the death of the insolvent, it was her duty to give them to the assignee.

Per Curiam.—How does it appear that she knew there was any assignee appointed, or that she was aware that he was entitled to the warrants. They might have been sent to the attorney for safe custody.

Rule refused.

LEIGH, Demandant, v. LEIGH, Tenant.

Jan. 18th.

IN this case a writ of right was sued out on the 28th of *December*, 1834, returnable on the 26th of *January*, 1835, and a precipe of the writ, bearing these dates, was filed at the office. The return-day of the writ was subsequently altered by the demandant three several times, viz., from the 26th of *January* to the 15th of *April*, from the 15th of *April* to the 30th of *May*, and from the 30th of *May* to the 21st of *November*: the writ was resealed upon each of those occasions, but no other precipe except that already stated was filed. It appeared by affidavit that the demandant was taking proceedings in Chancery for the recovery of the same property as was sought to be recovered under the writ of right, and that whilst those proceedings were pending, he caused the writ to be altered in the manner already mentioned. It was also shown by affidavit that it was not the practice of the office to file a new precipe when the return-day of the writ was altered. A summons was issued upon this writ in *November*, 1835, and the writ had been returned and filed in this court.

A writ of right was sued out on the 28th of *December*, 1834, but the return day was altered, from time to time, until the 21st of *November*, 1835, when the writ was enforced. Held, that this was in effect commencing a real action after the time limited by 3 & 4 W. 4, c. 27, s. 36, and the writ having been returned into the *Common Pleas*, that Court set aside the proceedings which were founded on the writ.

Wilde, Serjt., obtained a rule *nisi* to set aside the proceedings, upon the ground that the alteration abrogated the 3 & 4 W. 4, c. 27, s. 36, which enacts that no writ of right shall be brought after the 31st of *December*, 1834.

Humfrey shewed cause. The proceedings have been strictly regular. A precipe was filed when the writ was sued out, and the practice is not to file a new precipe when the return is altered; and the writ was resealed. The demandant would have harassed the tenant if he had proceeded to trial on the writ of right whilst the proceedings were pending in Chancery.

Wilde, Serjt., in support of the rule, was stopped by the Court.

TINDAL, C. J.—This case turns entirely upon the 3 & 4 W. 4, c. 27, s. 36, which enacts, that no writ of right of this description shall be brought after

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the 31st day of *December*, 1834, and the question is, whether this is not brought after that time. I can give no sense to the words used in the Statute—that no real action shall be brought, except by considering the suing out of the writ as the commencement of the suit. The writ itself is described in *Finch*, 237, as “a mandatory letter sealed with the great seal;” and looking at this writ, it appears upon the face of it, that it was sued out on the 28th of *December*, 1834, but the return-day appearing to be altered, we find upon explanation, that the writ was not served before the first return-day arrived, but was kept in the hands of the party as an inoperative instrument until *November*, 1835. The effect of this resealing was, in fact and in substance, to commence a real action after the period prescribed by the act of parliament, and if it was permitted, the act of parliament would be defeated. If the demandant was in difficulty as to which was the proper mode of proceeding, he should have enforced the writ of right before the return-day was altered.

PARK, J., concurred.

GASELEE, J.—The demandant might have gone on for any indefinite period, if this was sufficient.

BOSANQUET, J.—I am of the same opinion. The party sues out the writ in a form in which it was not available, and afterwards alters it by his own authority, thereby in effect abrogating the provisions of the 3 & 4 W. 4, c. 27, s. 36.

Rule absolute. (a)

(a) See the following case.

Jan. 30th.

FOOT, Demandant, *v.* SHERIFF, Tenant.

The Court of Common Pleas has no authority over a writ of right until it has been returned, and filed in that Court, and any application to set aside the writ for irregularity, must be made to the Court of Chancery.

A SUMMONS had been served on the deforciant, on the 24th of *October*, 1835, to appear to a writ of right returnable on the 2nd of *November*. On the 31st of *October* another summons was served upon the deforciant, to appear on the 20th of *November*, a notice having previously been delivered, stating that the return-day of the writ had been altered, and that the former summons was withdrawn. The writ was resealed after the return-day was altered.

Talfourd, Serjt., obtained a rule *nisi* to set aside the writ of right and the summons, upon the ground that the alteration of the writ was irregular.

Wilde, Serjt., and W. H. Watson, shewed cause. This Court has no jurisdiction to set aside a writ of right which has not been returned, because it is an original writ, which is issued out of the Court of Chancery. Here the writ has not been returned, and the Court has no jurisdiction to interfere. *Brown v. Babington* (a). As to the summons, that is not a document which can be the subject of this application. It is merely a notice from the sheriff, but it forms no part of the process. Nor was the alteration irregular after the writ was resealed. *Popkins v. Smith* (b), *Durdham v. Hammond* (c).

(a) 2 Lord Ray. 833.

(b) 7 Bing, 434.

(c) 1 B. & Cres. 111.

Vin. Abr. Tit. Amendment, B a. Cox v. Murray (d), Carr v. Shaw (e). And the practice of amending writs of right is of old date. [TINDAL, C. J.—With that we have nothing to do: it is a matter for the Court of Chancery.] In *Leigh v. Leigh (f)*, the writ was actually returned by the sheriff, and that gave the Court jurisdiction over it; and in that case the application was not to set aside the writ, but the proceedings which had been subsequently taken.

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Talfourd, Serjt., and Biggs Andrews, contra.—As soon as the writ was issued, the jurisdiction of this Court commenced, for it was made returnable here, and if the parties had not appeared, this Court would have taken notice of the default. The distinction taken by the Court of Chancery when a writ is returned, and when only returnable, is taken in *Weavers' Company v. Hayward (g), Smith v. Wilmer (h)*. That this amendment was irregular, appears by *Blackmore's case (i)*, and *Baylis v. Manning (k)*.

It is said that the summons forms no part of the proceedings, but *Leigh v. Leigh (f)* is an express authority upon this point, because the application there was to set aside the summons.

TINDAL, C. J.—It appears to me that this motion may be disposed of upon one short ground, viz., that this Court has no jurisdiction to interfere. The form of the writ is, that the sheriff do warn the tenant that, without delay, he render to the demandant his land which he claims; and it is perfectly clear that, until the sheriff makes a return of the writ, we have no jurisdiction. *Blackstone (m)* makes the return the precise ground of the jurisdiction of this Court. After stating that an original writ “is a mandatory letter from the king in parliament, sealed with his great seal, and directed to the sheriff of the county wherein the injury is committed, or supposed so to be, requiring him to command the wrong-doer, or party accused, either to do justice to the complainant, or else to appear in Court, and answer the accusation against him;” he adds, “Whatever the sheriff does in pursuance of this writ he must return or certify to the Court of Common Pleas, together with the writ itself, which is the foundation of the jurisdiction of that Court, being the King’s warrant for the judges to proceed to the determination of the cause.”

In *Com. Dig. Tit. Droit, C. 2*, it is also said, “If the tenant does not appear at the return of the summons, nor be essoigned, a *grand cape* issues against him. If he does not appear at the return of the *grand cape*, judgment final shall be against him.” It seems therefore that this Court has no jurisdiction to interfere; first, because the writ has not been returned, and secondly, because if it was returned, we are asked to set aside an original writ, which we have no authority to do. *Leigh v. Leigh (f)* differs from this case. There we were not asked to set aside the writ or the summons, but merely the service of the summons, and the writ had been returned into the

(d) 1 W. Black, 462.

(e) 7 T. R. 299.

(f) *Ante*, p. 411.

(g) 3 Atk. 362.

(h) 3 Atk. 595.

(i) 8 Rep. 157.

(k) 1 Bos. & Pul. N. R. 233.

(m) 3 Comm. 273.

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Court, and was handed up to me during the argument. There the facts were, that the summons appeared to have been served upon a writ which had no operation, and we merely relieved the tenant from the danger he incurred either by appearing or not appearing, and gave the parties an opportunity of applying to the Court of Chancery. If this case fell within the decision in *Leigh v. Leigh*, I do not say what the Court of Chancery would do; but all the cases which have been cited shew that the application should be made to that, and not to this Court.

The substantial application is to set aside the writ of right; for the summons is a mere notice, which it would be of no consequence to set aside, and the application is *coram non judice*. The rule must therefore be discharged.

PARK, J.—I agree that we have no jurisdiction to interfere, as the authorities show that it is the return of the writ which is the foundation of our jurisdiction; another objection is, that we have no power to set aside a writ issued by the Chancellor. There is a manifest and broad distinction between this case and *Leigh v. Leigh*, because that writ was returned, and filed in this Court.

GASELEE, J.—This Court has no authority to deal with writs of right until they are returned. Before they are returned we have no notice of their existence.

BOSANQUET, J.—I am of opinion that this Court has no jurisdiction to enter into the consideration of this matter, and therefore it must be understood that we have given no opinion upon the question of irregularity.

Rule discharged.

Jan. 13th.

TARPLEY v. BLABEY.

1. In an action for libel, it was proved that in September the defendant sent a letter to the plaintiff, containing several passages of a libellous letter published in the following November in a newspaper:—*Held*, that in an action for the publication in the newspaper, the portions which corresponded might be read in evidence to shew the *animus* of the defendant.

CASE for a libel. The cause was tried before *Tindal*, C. J., at the last sittings for London. The declaration contained several counts. The first set out a libellous letter addressed to the plaintiff, a clergyman, which was published in the *Northampton Free Press* in November, 1832. The second count contained the same letter, with the addition of several passages which did not appear in the first count. The other counts varied the description of the libel. It was in evidence that the plaintiff and defendant both resided at *Northampton*, and a letter in the defendant's handwriting, dated 8th September, 1832, was produced, which contained several passages of the letter which was afterwards published in the *Northampton Free Press*, and a witness who was servant to the defendant in the latter part of 1832, stated that she had taken such a piece of paper as the letter produced, to the plaintiff's house, at the defendant's request. Such parts of this letter as corresponded with the published libellous letter were read in evidence.

2. If a libel is sent to a newspaper, and the editor strikes out the most libellous portions, and publishes the remainder, the writer is liable for the part which is published.

3. In order to admit evidence of the publication of libels by the plaintiff against the defendant, it must be shown that they were the immediate provocation which led to the publication of the libel which is the subject of the action.

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A manuscript in the defendant's handwriting, which was found at the office of the *Northampton Free Press*, was also produced: it appeared that a pen had been struck through several of the most libellous passages in the letter, but the libel, as published in the newspaper, exactly corresponded with the manuscript, after the erasures were made.

For the defendant, evidence was offered to shew that the plaintiff had libelled and slandered the defendant, and that the libel in question had been provoked by these publications; but the witnesses not being able to state that these circumstances had occurred before the libel in question was published, the learned judge rejected the evidence. A verdict for 40s. was found for the plaintiff.

Adams, Serjt., moved for a new trial. *First*. The letter said to have been sent by the defendant to the plaintiff in *September*, 1832, ought not to have been admitted in evidence, when the publication in the newspaper was two months afterwards. It did not contain the libel which was complained of, nor was there evidence that any person had ever seen it. *Secondly*. The manuscript found at the newspaper office did not appear to be in the same state as it was when the defendant wrote it. He might have authorized the editor to publish it entire, but that would not authorize him to publish a part of it. At all events, the production of the manuscript letter could not be evidence of the publication of the parts struck through, and the damages were given for the publication of the whole letter. In *Adams v. Kelly* (a), where the defendant made a statement to the reporter of a newspaper, who took it down in writing, and sent it to be published, it was held, upon an action being brought for a libel, that the written statement sent by the reporter must be produced. *Thirdly*. The evidence offered as to the publication of libels and slander by the plaintiff concerning the defendant, ought to have been received. *May v. Brown* (b), was cited for the plaintiff at the trial, but that decision has been doubted in a recent case before Lord Denman, C. J. [*Kelly*, as *amicus curiæ*, stated that he was of counsel in the case referred to, and that Lord Denman received evidence of libels previously published, upon the ground that they furnished the immediate provocation, which led to the publication of the libel which was the subject of the action.]

TINDAL, C. J.—This is an application for a rule to show cause why a new trial should not be granted; first, on the ground that improper evidence was admitted at the trial; and, secondly, because evidence was improperly rejected. As to the first ground, it appeared, at the trial, that a letter, in the handwriting of the defendant, was brought to the plaintiff's house, and reasonable evidence was given to shew that it was brought to the plaintiff by the defendant's servant. The other objection refers to the manuscript from which the libel was printed, and it is said that it ought not to have been received, because certain alterations were made in it after it was written, and that the libel was not published as it was originally written. Now it was in evidence that the defendant was accustomed to send communications to the newspaper in which the libel was published, and that a manuscript in the defendant's writing was found in a room where the printing was carried on, which, upon examination,

(a) 1 Ry. & Moody, 157.

(b) 3 B. & Cress. 113.

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shewed that the libel in question was composed from it. The whole of the writing was still legible, and the libel which was published agrees with those parts of the manuscript which were not struck out. But if the defendant gave permission to the printer to publish the libel in a larger and more offensive form, he gives authority to publish it in that form which is less offensive. If, indeed it was shown that the parts which were omitted made the libel less offensive, the result would be very different, for the defendant might then very justly complain that the printer suppressed the publication of that which would have taken away the sting from the libel; but there is no reason to doubt in this case but that the printer, for his own security, struck out the parts which were omitted, that he might avoid the greater hazard which he would otherwise have incurred, and this, I think, is a sufficient answer to one point which has been argued in support of this rule. The next objection is, that a letter was received in evidence which was sent to the plaintiff by the defendant, but the exact time when it was sent did not appear; but this letter was in the defendant's handwriting, and many of the paragraphs contained in it agreed with the mutilated manuscript paper which was found at the printing office. To a certain extent these documents coincided, and I do not see upon what principle I could have excluded this evidence, as it corroborated and confirmed the plaintiff's case. I therefore allowed so much of this letter to be read as agreed with the other manuscript, for the purpose of shewing the *animus* of the defendant. As to the rejection of the evidence, it seemed that there had been a series of libellous publications between the plaintiff and the defendant; but in order to let in evidence of the publication of former libels according to *May v. Brown*, (c) it must at least be shewn that the libels were antecedent, so as to connect them with the particular libel which is complained of. Lord *Tenterden* says, "The evidence offered at the trial was of particular libels alleged to have been published and distributed by the plaintiff. It was not contended that any one of those libels could be said to be the provocation to the particular libel of which the plaintiff complains. I thought that, unless it could be made to appear that the libels offered in evidence related to the same subject as the libel on which the action was brought, I ought not to receive them as evidence. It is not contended that they do distinctly relate to the same subject as the libel on which the action is brought. It must now be taken that they did not. Then it comes to this single question, whether, when one man brings an action against another for libelling him, it is competent for that other to show, that, as to other subjects, the plaintiff has published libels on him. The inconvenience of allowing such evidence has been adverted to in argument; and no one who is acquainted with the nature and course of a trial by a jury who are summoned to try the issue joined between the parties, can doubt that it would be most inconvenient. That, however, is not of itself a decisive ground for the exclusion of evidence; but, in considering the question, whether evidence ought to be received, it is important to look at the inconvenience to which its reception would lead. If I had received the evidence in this case, the effect of it would have been, that the attention of the jury would have been distracted with a multiplicity of questions and issues, not raised upon the record, but raised on a sudden at *nisi prius*, of which the party against whom the proof

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was offered could have no previous notice, and which he could not come prepared in any degree to meet."—I think that the rule, thus qualified and restricted, is a very wise one, nor do I find from what has been stated, that Lord *Denman's* opinion at all militates against it. After all, this is a mere attempt to reduce the damages to a farthing, and I see no grounds for granting this rule.

PARK, J.—One point which has been much pressed upon us, is, that as the printer made the alterations in the manuscript letter, therefore he is liable for the publication, because he acted without the defendant's authority; but I cannot agree with that proposition. If, indeed, there had been a qualification of the libel, and the printer had struck it out of his own authority, then the case would be very different; but when the printer merely struck out the parts which were most libellous, the writer would still remain liable for that which was published. As to the other letter, I agree that it was properly admitted in evidence to shew the *animus* of the defendant. Upon the last point, the case of *May v. Brown* (d), remains totally uncontradicted; and *Finnerty v. Tipper* (e), affords additional confirmation to support the principle there established. It is said that the former case was questioned by Lord *Denman*; but, according to Mr. *Kelly's* statement that does not appear to be the case; for Lord *Tenterden* seems to have put the point upon the same ground as Lord *Denman*. Lord *Tenterden* says, "It was not contended that any one of those libels could be said to be the provocation to the particular libel of which the plaintiff complains." The inference from this is, that the evidence would be admissible if the libel had been the provocation which led to the publication of the particular libel.

GASELEE, J.—I am of the same opinion. There was no evidence given at the trial to shew that the editor of the newspaper had struck out the erased portions of the manuscript. But it seems to me sufficient to say that the rule is, that if the manuscript was altered so as not to injure the letter in substance, that it makes no difference; although, if the substance of the letter had been altered, there might then have been some ground for saying that the publication was not authorized.

BOSANQUET, J.—I am of opinion that no rule ought to be granted. Assuming that the erased parts of the letter were not struck out by the defendant himself, I think he would still be answerable for the publication, provided the sense of the passages which remained were not altered. If I employ a person to do an illegal act, and he omits to do it with circumstances of aggravation, I am not the less answerable for that which he does do. As to the letter, I think the whole was evidence to show the *animus* of the defendant. With respect to the evidence which was rejected, it appears that the libels which were published by the plaintiff were entirely unconnected with the libel complained of, and that distinction is taken in *May v. Brown*, (d) which has been cited. This point, therefore, clearly affords no ground for disturbing the verdict.

Rule refused.

(d) 3 B. & Cress. 113.

(e) 2 Camp. N. P. C. 72.

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In Re ANDERSON.

Jan. 11th.

The acknowledgment of a conveyance made by a married woman in Ireland, in pursuance of 3 & 4 W. 4, c. 74, cannot be taken before a commissioner of the Irish courts of common law.

THE acknowledgment of a conveyance made by Mrs. *Anderson* under stat. 3 & 4 W. IV. c. 74, was taken in the County of *Tyrone* in *Ireland*, before a commissioner appointed by the Court of Common Pleas in *Ireland*, and his signature to the affidavit was verified by a notarial certificate. The officer of the Court refused to file the documents, because the affidavit was not made before a commissioner appointed by this Court.

Kaye now moved that the documents might be received. The affidavits show that there is no commissioner appointed by this Court who resides within one hundred miles of *Tyrone*. The 3 & 4 W. 4, c. 74, does not state before whom the affidavit ought to be made; and this Court has frequently received affidavits sworn before commissioners appointed by the Irish Courts, as in *Kilby v. Staunton* (b).

TINDAL, C. J.—In the case cited, the affidavit had nothing to do with the acknowledgment of a fine. The affidavit must be such as to enable a party to assign perjury upon it; and it ought to be made before a commissioner appointed by this Court. (c)

The other Judges agreed.

Kaye took nothing.

(b) 2 Y. & J. 75.

(c) See Stats. 3 & 4 W. 4, c. 42, sec. 42, and 3 & 4 W. 4, c. 74, secs. 81, 83, and

84; also the Rules and Forms issued under the latter Stat. M. T. 1833.

Jan. 30th.

MITCHELL v. DARTHEZ and another.

By a charter-party, it was agreed that the ship *Jane* should take in a cargo of coals, and proceed to *Buenos Ayres*, and should there re-load such goods as the freighters

ASSUMPSIT for freight in respect of the carriage of merchandize, carried by the plaintiff on board of divers vessels, and for the use and hire of vessels, for money lent to the defendants, for money expended for them, for money had and received by them, and on an account stated.

At the trial before Tindal, C. J., at the *London* sittings after *Trinity* Term, 1833, a verdict was found for the plaintiff, for 655*l.* subject to the opinion of the Court upon the following

should cause to be shipped, and proceed to a port between *Gibraltar* and *Antwerp*. The freight for the said voyage out and home 1,300*l.* in full, if delivered at *Gibraltar*; 200*l.* to be paid in *London* on the vessel being dispatched from *Portsmouth*, cash for the necessary expenses of the vessel in the river *Plata*, and the remainder to be paid on the final delivery of the homeward cargo. The vessel reached *Buenos Ayres*, and delivered her cargo, and the 200*l.* was paid in *London* when she sailed. At *Buenos Ayres* she received a cargo of hides, and on her homeward voyage to *Gibraltar* was wrecked at the *Azores*, but a part of the cargo was saved, which the vice-consul, acting on behalf of the owners of the cargo, upon the suggestion of the Captain of the *Jane*, forwarded to *Gibraltar* by another vessel:—*Held*, that, under the circumstances, the plaintiff was not entitled to recover the full freight agreed to be paid by the charter party, but that he was entitled to claim freight *pro rata itineris*, for the conveyance from *Buenos Ayres* to the *Azores*, of that portion of the cargo which was ultimately received at *Gibraltar*.

CASE.

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At the time of the making of the memorandum of charter-party hereinafter mentioned, the plaintiff was part-owner of the ship *Jane*, of which *James Weddell* was master, and also a part-owner.

The defendants were merchants in *London*. On the 7th of *October* 1828, the plaintiff entered into an agreement of charter-party with the defendants, by which it was agreed that the plaintiff's ship *Jane* should receive on board a cargo of coals, or such other legal goods as the said merchants might cause to be sent alongside, and should proceed therewith to *Solado*, in the river *Plata*, and either there deliver the same, or proceed to *Buenos Ayres* (provided the blockade of the latter port should then be known to be raised,) and there deliver the same; and should then re-load at the port of delivery all such legal goods as the said freighter's agents might cause to be shipped; and being so loaded, should therewith proceed to a safe port, between *Gibraltar* and *Antwerp*, both inclusive, calling at the former port for orders, if so required, and deliver the same according to the custom of the port: freight for the same voyage out and home 1,300*l.* in full, if delivered at *Gibraltar*, a port in *Spain*, or *London*, or *Liverpool*; and 5*l.* per cent. thereon additional, if delivered at a port in *France* or at *Antwerp*; together with a gratuity of 50*l.* to the said master, should he succeed in breaking the blockade at *Solado* inwards and outwards: (restraint of princes, and rulers, the act of God, the king's enemies, piracies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever during the said voyage, always excepted:) the freight to be paid as follows, viz., 200*l.* to be paid in *London*, on the vessel being despatched from *Portsmouth*; cash for the necessary expenses of the vessel in the river *Plata*, to be advanced there at the current rate of exchange upon *London*, free of commission; and the remainder to be paid on final delivery of the homeward cargo, in cash, and at the current exchange of *London* if delivered at a foreign port. Sixty running days to be allowed if the vessel was not sooner despatched, for loading the ship at the river *Plata*, and delivering at the final port of discharge; the vessel to be despatched from *Portsmouth* on the 23d of *October* 1828, and thirty days to be allowed on demurrage, if required, over and above the said lay days, at 4*l.* 4*s.* per day: the master, if required, to sign bills of lading for more or less freight than above stipulated, without prejudice to the charter-party: the vessel to be consigned to the freighters or their agents, at the ports of loading or unloading: penalty for non-performance of the agreement, 1,800*l.* The merchants were to have the option at the ports of lading to send their own stivadores to store the cargoes; and all parts of the vessel, except the cabin, the forecastle, and room for ship's stores, to be at the disposal of the freighters. During the voyage a supercargo, if required, was to have a free passage out and home, he finding his own provisions and necessaries. On the 23d of *October* 1828, the *Jane* left *Portsmouth*; and on the 31st of the same month, the defendants paid the plaintiff in *London*, the sum of 200*l.* pursuant to the agreement of charter-party. The *Jane* carried out eighty chaldrons of coals for *Buenos Ayres*, in lieu of ballast, the bill of lading for which specified that freight was to be paid as per charter-party. The *Jane* arrived at *Buenos Ayres* in *January* 1829, and delivered part of the coals to Messrs. *Larrea Brothers*, on whose account, as principal, the charter-party in question, had been effected by the defendants, and part of the coals remained on board, with the

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consent of Messrs. *Larrea Brothers*, in ballast, and on the 21st of *February* 1829, 5996 dry hides and 104 lining hides were laden on board, under a bill of lading, of which the following is a copy:—

“Shipped in good order and well conditioned by Messrs. *Larrea Brothers*, in and upon the brig called the *Jane*, whereof is master for the present voyage Captain *James Weddell*, now in the harbour of *Buenos Ayres*, and bound for *Gibraltar*, say, 5,996 dry hides, 104 lining hides, and five more to be delivered, if on board, being marked and numbered as in the margin, and are to be delivered in like good order and well-conditioned, at the aforesaid port of *Gibraltar*, the danger of the seas only excepted, unto Messrs. *T. P. Echcopar & Co.*, in the first place; and to Mr. *J. M. Hurtado*, in the second place, or to their assigns, he or they paying freight for the said goods at the rate of 4l. 10s. sterling per ton, with the prime and average accustomed. In witness whereof, the master of the said brig hath affirmed to eight bills of lading of this tenor and date, one of which being accomplished, the other to stand void. Dated in *Buenos Ayres*, the 21st of *February* 1829, (signed) *James Weddell*.”

The freight of the said hides, under the said bill of lading was 340l., and the rate therein stated of 4l. 10s. per ton, was the usual freight at that time for hides from *Buenos Ayres* to *Gibraltar*.

On the 28th of *February* 1829, Messrs. *Larrea Brothers*, advanced to Captain *Weddell* the sum of 1,071 current dollars for the necessary expenses of the vessel at *Buenos Ayres*, which sum, at the current rate of exchange upon London, was 66l. 3s. 11d. sterling money.

On the same 28th of *February* 1829, the *Jane* sailed for *Gibraltar*, and shortly afterwards sprung a leak, lost spars and sails, and being otherwise much distressed and damaged put into *Fayal*, one of the *Azores' Islands*, on the 21st of *May* 1829. She was then surveyed by competent persons and condemned to be sold as unseaworthy, and unfit for repair.

The cargo, consisting of the coals and the hides, amounting to 5,991 dry hides, and 104 lining hides, (there being five hides shipped less than mentioned in the bill of lading), was taken out and landed at *Fayal*, and 1,475 hides were found damaged, and in consequence of the damage, and under the direction of the board of health at *Fayal*, 1292 hides were sold as damaged, and 183 were thrown into the sea, under the direction of the board of health at *Fayal*, as being utterly worthless. The coals were also sold: 120 hides which were moth-eaten were sold by public auction, and 200 further hides which were undamaged were sold by private contract, and the proceeds of the coals and the whole of the damaged and undamaged hides that were sold, except the 224l. 3s. 9d. hereafter mentioned, were applied to defray the necessary charges of unloading, warehousing, cleaning, and beating and reloading the cargo. Besides the hides sold, 172 hides were retained by Mr. *Walker*, the British Vice-Consul, for his commission of 4l. per cent. on the cargo.

After payment in manner aforesaid, of the charges incurred in respect of the cargo, up to the 10th of *July* 1829, Captain *Weddell* had in his hands a net balance of 1,055 dollars, or 224l. 3s. 9d. English money belonging to the defendants, with which said balance in dollars, he on or about the 12th of *July* sailed in the schooner *Swallow*, for *England*. On the following day the *Swallow* was wrecked off the Island of *Pico*, and Captain *Weddell* lost the dollars he had with him, as well as all his papers. Between the 21st of *May* and the

23rd day of July 1829, no vessel had arrived at *Fayal*, of capacity to carry on the cargo which Captain *Weddell* could engage, and before his departure from *Fayal*, he left instructions with Mr. *Walker*, the British Vice-Consul at that place, to forward the remainder of the hides, being then 4,138 hides in number, by the earliest opportunity to *Gibraltar*.

The following letter of instructions on the subject, was addressed by Captain *Weddell* to the Vice-Consul at *Fayal* on the 23rd July :—

“ *Henry Walker*, Esq.

“ Sir,

“ Being informed by Mr. *James Searle*, that he is expecting the arrival of a vessel with capacity for carrying on the remaining part of the late brig *Jane's* cargo, and that the vessel being originally destined for *Newfoundland*, he cannot take freight to *Gibraltar*, under the sum of 400*l.* sterling.

“ I have therefore to request, if possible, you will obtain some reduction of freight, if circumstances may enable you to do so, but as the hides are daily incurring expense of keeping, with a slow depreciation in value, they frequently requiring beating, to dislodge the worm, I recommend your giving that sum, viz. 400*l.*, rather than an opportunity of sending the cargo forward should not be embraced, &c. &c.

(Signed)

“ *James Weddell*.”

On the next day, the 24th, Captain *Weddell* sailed again for *England*, and on the 29th July 1829, Mr. *Walker*, the Vice-Consul, entered into a charter-party, of which the following is a copy :—

“ It is this day mutually agreed between *James Searle & Co.*, agents for the good schooner called the *Flora*, whereof is master *Alexander Christie*, and now riding at anchor in the road of *Fayal*, and *Henry Walker*, Esq., British Vice-Consul of *Fayal*, on the part and behalf of the owners of the cargo, and hides landed from the brig *Jane*, *James Weddell* master, that the said ship being tight, stanch, and strong, and every way fitted for the voyage, shall receive on board a cargo of dry hides, not exceeding what she can reasonably carry away over and above her tackle, apparel, provision, and furniture, and being so loaded shall proceed therewith to *Gibraltar*, or so near thereto as she may safely get, and deliver the same on being paid freight for the same, 360*l.* sterling, with primage of five per cent., the freight to be paid in cash on right delivery of the cargo. Thirty running days are to be allowed the said charterer for loading at *Fayal*, and discharging the cargo at *Gibraltar*, and demurrage at that period, at the rate of three guineas per day. It is further agreed that in the event of the vessel being obliged to perform quarantine at *Gibraltar*, in consequence of having hides on board, the time so taken up is to be included in the demurrage days, and paid for at the same rate by the charterer: the demurrage and stowage is to be at the expense of the charterer. And the parties having thus agreed to bind themselves, the one with the other, in the penal sum of 400*l.* for the non-performance of this contract. In witness whereof, the said parties have hereunto affixed their names, &c.”

When this agreement of charter-party was made, 4,138 hides of the cargo of the ship *Jane* remained at *Fayal*, of which 3,959 were laden on board the

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Flora, and a bill of lading signed for the same by *Alexander Christie*, the master of the said vessel, of which the following is a copy:—

“ Shipped by the grace of God, in good order and well conditioned, by *Henry Walker*, in and upon the good ship called the *Flora*, whereof is master under God for this present voyage, *Alexander Christie*, and now riding at anchor in the road of *Fayal*, and by God's grace bound for *Gibraltar*, 3,959 dry hides, being marked and numbered as in margin, and are to be delivered in the like good order and well-conditioned at the aforesaid port of *Gibraltar*, the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever excepted, unto Messrs. *J. P. Echeconpar*, in first place; *Mr. J. M. Hurtado*, in second place, or to their assigns; he or they paying freight for the said goods as per charter-party, 360*l.* sterling, with 5*l.* per cent. primage.”

The remaining 179 hides would also have been stowed on board the *Flora*, had it not been for want of proper stowers, who had absconded in consequence of a general impress of men to go in the gun-boats to attack *Terceira*.

For this reason the 179 hides were left behind. The 3,959 were duly delivered at *Gibraltar* to Messrs. *R. P. Echeconpar*, & Co., who paid the freight and primage according to the bill of lading, amounting to 378*l.*, on the goods being delivered to them.

The question for the opinion of the Court is, whether the plaintiff is entitled to any, and what amount of freight from the defendant.

If the Court shall be of opinion that the plaintiff is entitled to any freight, and that the excess of such freight beyond the sums paid by the defendant, shall amount to the verdict, then the verdict is to stand, or the damages are to be reduced on such principle, and to such extent, as the Court shall direct. And if the Court shall be of opinion that the plaintiff is entitled to no freight under the circumstances above stated, or to no larger sum than he has already paid, then a nonsuit is to be entered.

The following were the points marked for argument by the plaintiff.

First. It will be contended that the owners having performed the whole voyage, and delivered the cargo at *Gibraltar*, are entitled to the full freight of 1,300*l.*; but if not,

Secondly. That the freight may be apportioned, and that the owners are entitled to receive for the carriage of the goods actually delivered at *Gibraltar*, and there accepted by the freighters' agents; an amount of freight bearing such a proportion to the full freight of 1,300*l.* as the amount of the goods delivered, and of those disposed of and left at *Fayal*, may bear to the full cargo shipped at *Buenos Ayres*.

Thirdly. That if not entitled to the whole freight, the plaintiff is entitled to be paid freight *pro rata itineris*, calculated on the basis of the freight for the whole voyage, stipulated by the charter-party.

The points for the defendants were,

First. That the 1,300*l.* chartered freight, was only payable on the contingency of the ship's arriving with the whole of her cargo at *Gibraltar*, or one of the other ports of destination mentioned in the charter, and that the condemnation of the *Jane*, at *Fayal*, put an end on both sides, to the contract under the charter, and that as the ship never arrived, and as part of the cargo only

arrived, and even that part was not directly carried on by the plaintiff, but was carried in a ship of which the freight was paid by the defendants themselves; that the plaintiff had, in fact, not performed the voyage, or made a final delivery within the meaning of the charter.

Secondly. That even if it be held that the condemnation at *Fayal* did not end the charter, and if any *pro rata* part of the chartered freight were payable, still such *pro rata* part could only be such a proportion of the 1,300*l.* as the hides, which actually reached *Gibraltar*, bore to the whole shipped at *Buenos Ayres*; and that even then the monies with which the defendants are entitled to charge the plaintiff exceed this proportion of the 1,300*l.*

Thirdly. That the plaintiff can have no claim upon any implied contract, independently of the charter, for that part of the hides conveyed to *Gibraltar*.

1. Because the hides were not forwarded under circumstances which could raise an implied contract between the plaintiff and the defendants.

2. Because if it did the plaintiff is only entitled to the current freight from *Buenos Ayres* to *Gibraltar*, and then the freight actually paid on the goods sent on from *Fayal*, exceeded the current freight prevailing at that time on goods from *Buenos Ayres* to *Gibraltar*.

3. Because, at all events, that freight (together with the other sums with which the defendants are entitled to charge the plaintiff,) exceed any freight that could be payable under an implied contract.

Shee, for the plaintiff, cited *Ritchie v. Atkinson* (a), *Abbot on Shipping*, 240, 309, 5th ed.; *Hunter v. Princep* (b), *Potier, Traité du Fret*, 393. *Pardessus Courts de Droits Commerciaux*, vol. 3, 77, sec. 644.

Spankie, Serjt., for the defendants, relied on *Smith v. Wilson* (c), *Abbot on Shipping*, 301, 327, 328; *Hotham v. The East India Company* (d). It was admitted, on both sides, that there was no case in point which could govern the decision of the Court.

Cur. adv. vult.

TINDAL, C. J.—In this case, two questions arise;—first, whether the plaintiff is entitled to recover the full freight agreed to be paid by the charter-party; and secondly, if not entitled to recover the full freight, whether he is entitled to recover any and what freight *pro rata itineris*. First, in order to entitle the plaintiff to recover the full freight, he must establish that he has performed the voyage prescribed by the charter-party. The first part of the voyage was duly performed, by the arrival of the ship at *Buenos Ayres*; and a destination for the accomplishment of the homeward voyage was given by the freighter there, who appointed *Gibraltar* as the port of discharge. But the plaintiff never performed that homeward voyage, either in the ship mentioned in the charter-party or any other. The original ship, and about one third of the cargo, having been lost by perils of the seas, the remainder of the cargo was left at the Island of *Fayal*, by the master, who, on the 12th of *July*, sailed in another vessel for *England*, having left instructions with the vice-consul at *Fayal*, to forward the remainder of the cargo (about two-thirds), by the earliest opportunity to *Gibraltar*. The master having been wrecked, on the next day

(a) 10 East, 295.

(b) 10 East, 378.

(c) 8 East, 437.

(d) 1 T. R. 638.

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returned to *Fayal*, and remained there until the 24th of *July*, when he again sailed for *England*, having on the 23rd addressed a letter to the vice-consul, stating his having been informed of the expected arrival of a vessel originally destined for *Newfoundland*, and recommending the vice-consul, if he could not obtain a reduction of 400*l.* for the freight, to give that sum for the conveyance of the remainder of the cargo to *Gibraltar*, rather than an opportunity of sending the cargo forward should be lost. No authority appears to have been given to the vice-consul to make any contract for the hire of a vessel on account of the owners of the *Jane*. The master of the *Jane* certainly did not make any, nor did he personally make provision for the conveyance of the remainder of the cargo to its destination, much less superintend its transshipment, or accompany it to the port of discharge. Before his departure from *Fayal*, no vessel of sufficient capacity to convey it had arrived at *Fayal*; but, on the 29th of *July*, such a vessel having arrived, the vice-consul chartered that vessel on behalf of the owners of the cargo of the *Jane*, at a freight of 360*l.* for the conveyance of the goods to *Gibraltar*. Under this charter-party, the vessel so hired by the vice-consul, on behalf of the owners of the cargo, sailed to *Gibraltar*, and delivered it to their agents, who received and paid freight and charges 378*l.* Under these circumstances it appears to us that the goods which were so left by the master of the *Jane*, at *Fayal*, having been forwarded to *Gibraltar* by the vice-consul, acting in the name and on behalf of the owners of the cargo, and at their expense, cannot be said to have been carried to their destination by the owner of the *Jane*, in fulfilment of the charter-party entered into with the defendants, and consequently that the freight stipulated to be paid by the charter-party, has not been earned.

The next question is, whether any thing in the nature of freight is recoverable by the plaintiff, upon a new and implied contract, founded on meretorious service rendered to the defendants by the plaintiff, in the partial performance of the voyage contemplated, and the acceptance of the goods by them under the circumstances stated in the case. The carriage of the goods from *Fayal* to *Gibraltar*, not having been the act of the plaintiff, we are of opinion that no claim to freight can be made by the plaintiff, for that portion of the voyage. And we are also of opinion, that the plaintiff has no right to claim any freight *pro ratâ itineris* for the outward voyage from *England* to *Buenos Ayres*. The freight for the entire voyage was a gross sum of 1,300*l.*; of which 200*l.* was to be paid in *England* in cash, for the necessary expenses of the vessel in the river *Plata*, and the residue at *Gibraltar*, at the current exchange upon *London*.

If the vessel had arrived at *Buenos Ayres*, and had been lost immediately afterwards, we think that nothing beyond the 200*l.* paid in *London*, could have been claimed. But as she actually brought from *Buenos Ayres* to *Fayal*, on her way to *Gibraltar*, a considerable portion of the cargo put on board at *Buenos Ayres*, which portion has come to the hands of the freighters, and been accepted by them; the question arises, whether the ship-owner has not a claim to freight *pro ratâ* for the conveyance of that portion of the goods from *Buenos Ayres* to *Fayal*. And, upon the best consideration which we can give to the case, we think he has such claim.

We have already said that the goods were forwarded by the Vice-Consul, acting as the agent of the freighters; but the Vice-Consul was desired by the master of the *Jane* to forward them, though not desired to forward them on

behalf of the ship-owner. The agents of the freighters at *Gibraltar* have accepted the goods, paid the freight, and thereby recognized the act of the vice-consul as their agent. The case, therefore, must stand in the same position as if the freighters had accepted the goods of the master of the *Jane* at *Fayal*, and conveyed them on their own account to *Gibraltar*, in which case we think that they would be liable to pay freight for that portion of the voyage performed, in respect of the goods accepted. At what rate the freight is to be calculated, is the remaining question to be considered, and we are of opinion that the ship-owner, under the circumstances of this case, cannot claim any remuneration beyond a reasonable freight from *Buenos Ayres* to *Fayal*, the amount of which the arbitrator will determine. The freight agreed upon by the charter was not of an ordinary kind, but a gross sum to be paid in case of the performance of an extraordinary voyage. That voyage has not been accomplished: the voyage was not in its nature divisible, so as to give to the ship-owner a claim to any aliquot part upon the performance of a certain portion of the voyage. The claim of the ship-owner must, therefore, rest upon an implied contract to remunerate him for service performed, not according to the agreement, but a service from which the freighters have received a benefit; and whether, upon the whole, the ship-owner has been overpaid or not, will appear when the account is taken by the arbitrator, on this principle, between the parties.

We forbear to enter into any particular examination of the authorities referred to, it having been admitted, on both sides, that no case is to be found, the circumstances of which so nearly resemble those of the present case, as to govern our decision. The verdict, therefore, in this case, will stand for such sum as the arbitrator finds remaining due to the plaintiff.

Judgment for plaintiff.

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June 8th & 11th.

ASSUMPSIT by the indorsee of three bills of exchange for 500*l.* each; two drawn by one *P. Clissold*, and the third by one *Thomas Wilson*, upon and accepted by the defendant. At the trial before, *Tindal, C. J.*, at the *London* sittings after *Hilary* Term 1835, the following facts were in evidence. In 1833, the defendant entered into a negociation with one *Hart*, an advertising money-lender, and was induced, by a promise of an advance of money, to write his name across ten six-shilling bill-stamps, as follows:—"Accepted. Payable at Messrs. *Præd's, & Co. J. Astley.*"

Hart never paid the defendant any part of the money which he had promised to advance, but caused the bills to be filled up and put in circulation; and the three bills above-mentioned, formed part of the blank acceptances which were thus procured from the defendant.

As to one of the two bills drawn by *Clissold*, the following facts were proved. On the 8th of *August* 1833, the bill-stamp, which had then nothing upon it but the defendant's acceptance, was brought to *Clissold* by one *Palmer*, and, at his request, *Clissold* wrote his name at the foot of the bill as drawer,

1. The defendant gave a blank acceptance on a bill stamp, and a person who was quite unknown to the acceptor afterwards wrote his name as drawer and indorser of the bill, and it was subsequently filled up as a bill of exchange for 500*l.* *Held*, that it does not lie in the mouth of the acceptor to say that such drawing and indorsing of the bill was irregular.

2. Where a bill with a blank acceptance, was drawn and indorsed by one *Richardson*, in the fictitious name of *Wilson*. *Held*, in the absence of evidence, that the drawer passed himself off, for a different person of the name of *Wilson*, or of any intention to defraud any other person, that it was not a forgery, and that the bill was not void.

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and also on the back as indorser, and delivered it again to *Palmer*. No consideration was given to *Clissold* for this act, nor did he know any thing further about the bill, or how the defendant's acceptance had been procured. The body of the bill was subsequently filled up as a bill of exchange for 500*l.*, payable at two months' date, but it was not proved who completed the bill.

As to the bill drawn by *Wilson*, the evidence was that *Wilson's* real name was *Thomas Wilson Richardson*, and that he filled up the bill and put his name as drawer and indorser.

The plaintiff was called upon to prove the consideration which he gave for the bills, and much contradictory evidence was offered upon this part of the case, and to shew that the plaintiff was innocent of the fraud which had been practised on the defendant. The jury found a verdict for the plaintiff on the bill drawn by *Wilson*, and on one of the bills drawn by *Clissold*; and for the defendant, on the other bill.

Sir *W. Follett*, in pursuance of leave reserved at the trial, obtained a rule nisi, to enter a nonsuit or for a new trial. He objected, that the bill to which *Clissold* had put his name, was not drawn and indorsed according to the custom of merchants, and that *Wilson*, whose real name was *Richardson*, had been guilty of an act of forgery, and that the acceptor was, therefore, not bound to pay that bill (a).

Spankie, Serjt., *Maule*, and *Greenwood*, shewed cause.

First. The defendant by writing his name across the bills gave an authority to the person to whom he delivered them, to cause them to be filled up, and put in circulation. *Russel v. Langstaffe* (b), *Collis v. Emmett* (c), and *Stone v. Freeland*, there cited. *Gibson v. Minet* (d), *Snaith v. Mingay* (e), *Bennet v. Farnell* (f). The last case on this subject is *Cooper v. Meyer* (g), where it was held that if a bill is drawn in the name of a fictitious person, payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as the drawer; and *Bayley, J.* says, "The defendants ought not to have accepted the bills without knowing whether or not there were such persons as the supposed drawers. If they chose to accept without making the inquiry, I think they must be considered as undertaking to pay to the signature of the person who actually drew the bill."

Secondly. As it was not proved that *Richardson* assumed the name of *Wilson* for the purpose of committing a fraud, the court will not presume fraud, and the mere use of another name does not of itself constitute a forgery. *Peacock's case* (h), *Rex v. Aickles* (i).

Sir *W. Follett* and *Martin*, *contrà*.—It is not contended that an acceptor is not bound to pay a bill after he accepts it in blank; he then authorises the person to whom he delivers it to fill up the bill; but he does not authorise a third person, who is a stranger to him, to do so, and that is the distinction between

(a) Another ground of nonsuit was, the insufficiency of a stamp affixed to certain correspondence between the plaintiffs' agents and the indorser of the bills, but the court gave no opinion upon this question. It is, however, thought proper to give the judgment of the court, as it was delivered, which includes this part of the case.

(b) Dougl., 514.

(c) 1 H. Black. 313.

(d) 1 H. Black. 669.

(e) 1 M. & S. 87.

(f) 1 Camp. N. P. C. 129, and note 180 c.

(g) 10 Barn. & Cress., 468.

(h) Russell & Ryan, Cr. C. 278.

(i) 2 East. Pleas, Cr. 963.

this case, and those which have been cited on the other side. A bill of exchange is only negotiable by the custom of merchants: but there is no custom which authorises a total stranger to the acceptor, to affix his name as drawer, and to indorse. Thus in *Russel v. Langstaffe* (k), the person who filled up the blanks was himself a party to the transaction. The same remark is applicable to *Collis v. Emmett* (l), *Snaith v. Mingay* (m), *Gibson v. Minet* (n), and *Cooper v. Meyer* (o).

It might be said, on the authority of these cases, that the defendant gave *Hart* an authority to draw the bills, but it is going one step further to say that he is bound by the acts of *Clissold*, who was altogether unknown to him. Another objection is, that when *Clissold* put his name to the back of the bill it had no existence as a bill, and it did not amount to any indorsement of it, in point of law. *Robinson v. M'Donnell* (p), *Robinson v. Yarrow* (q).

As to the second point, the circumstances of the case were such as ought to have induced the jury to find that *Wilson* fraudulently assumed the name of *Richardson*.

Cur. adv. vult.

TINDAL, C. J.—In this action, which was brought by the plaintiff, as indorsee of three bills of exchange, for 500*l.* each, two of which purported to be drawn by one *P. Clissold*, and the third by one *Thomas Wilson*, upon and accepted by the defendant; the jury found a verdict for the defendant upon one of the bills drawn by *Clissold*, and for the plaintiff upon the other two bills; and the case is brought before us upon a motion by the defendant, to enter a nonsuit, and also for a new trial.

Two objections were urged at the trial as grounds for a nonsuit; first, the want of a proper stamp upon an agreement produced in evidence by the plaintiff; secondly, that neither the bill of exchange drawn by *P. Clissold*, nor that drawn in the name of *Wilson*, were producible in evidence, the former not being drawn according to the custom of merchants, and the latter appearing on the evidence to be a forgery, and not the genuine bill of any person really in existence. As to the objection that the agreement was improperly stamped, it arose thus:—it became a necessary part of the plaintiff's case to prove that he was a *bond fide* holder of the three bills for a valuable consideration; and the consideration set up by him was, that the bills of exchange were given by one *Dimsdale*, a corn-factor, to *Rucker* and *Grohle*, the agents of the plaintiff, under an agreement by which, on the one hand, they were to deliver to *Dimsdale* the bills of lading of a cargo of wheat belonging to the plaintiff, and on the other, to hold the three bills of exchange, together with certain other bills, as a security to the plaintiff for the price of the wheat. It was proved that on the 10th of August, *Dimsdale* did, in fact, deliver two of the three bills of exchange to *Rucker* and *Grohle*, and that, on the 12th, he received from them one of the bills of lading for about half the cargo; but that he did not deliver the third bill of exchange to *Rucker* and *Grohle* until the 16th, when the other securities not having been delivered by *Dimsdale*, as stipulated for, and some doubts existing as to his solvency, the plaintiff's agents refused to part with

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(k) Dougl. 514.

(l) 1 H. Black. 313.

(m) 1 M. & S. 87.

(n) 1 H. Black. 599.

(o) 10 B. & Cress. 468.

(p) 5 M. & S. 236.

(q) 7 Taunt. 455.

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their entire control over the second bill of lading, and put it into the hands of a third person, who was to hold it as between both parties. Ultimately, however, the sum of 500*l.* was raised upon it by sale of part of the wheat, and paid over to *Dimsdale*, or to his use. On the 19th of *August*, *Dimsdale* stopped payment; being at that time indebted to the plaintiff in respect of the wheat delivered under the first bill of lading, and the money raised for *Dimsdale's* use upon the second bill of lading, in a sum somewhat exceeding the amount of the three bills of exchange. It is obvious, therefore, that there was a good and valuable consideration given for these bills, if the three bills were in fact delivered to *Rucker* and *Grohle* on the agreement above stated; and in order to prove it, the plaintiff called *Grohle*, who stated an agreement to have been made verbally to the effect above stated, and that, whilst he and *Dimsdale* remained in the counting-house, he, *Dimsdale*, wrote a letter and signed it, and handed it over to the witness, which, as the witness stated, contained the contract; after which, and whilst they still continued together, the witness wrote another letter to *Dimsdale*, and signed it, and delivered it to *Dimsdale*; each party keeping the letter signed by the other. The two letters were then put in, the letter written by *Dimsdale* being stamped with an ageement stamp of 1*l.* Upon which two objections were taken by the defendant's counsel; first, that the agreement was to be made out, not from *Dimsdale's* letter only, but from the two letters taken together, and in such case the Stamp Act required a stamp of 1*l.* 15*s.* upon one of the letters, and that the stamp of 1*l.* only, was insufficient; and secondly, that if either of the letters, taken singly, constituted the agreement, it was not the letter signed by *Dimsdale*, which ought to be considered as a proposal only, but the letter of *Rucker* and *Grohle*, which must be considered as the acceptance of such proposal, and therefore as the agreement itself. On the other hand, it was contended by the plaintiff that the agreement related to the sale of goods, wares, and merchandizes, and therefore fell within the exception in the Stamp Act, and was altogether exempted from any stamp; or, if it was an agreement to be proved from the two letters, still that the stamp of 1*l.* only was sufficient; the stamp of 1*l.* 15*s.* not being imposed unless the number of words exceeded 1080, which was not the case here.

These points were severally discussed before us in argument, but, upon the ground on which we deem the letter of *Dimsdale* to be admissible as evidence of the agreement, it becomes unnecessary to give any opinion on either of the points argued before us. For the letter of *Rucker* and *Grohle*, which was written subsequently to *Dimsdale's*, appears, upon inspection, not to be an acceptance of the proposal contained in *Dimsdale's* letter, but is altogether at variance with such proposal; *Dimsdale's* letter in effect declaring that he consented that the three bills should be set against the price of the plaintiff's wheat; *Rucker* and *Grohle's* letter, on the contrary, stating that two of the bills, with a third bill of General *Palmer's*, should, when cashed, be placed against *Dimsdale's* private account with them: and adding other conditions on which they proposed to deliver the two bills of lading to *Dimsdale*.

The two letters, therefore, not relating to the same contract, it becomes necessary to decide which of the two constitutes the agreement, on which the bills were delivered over; and we are of opinion, in the situation of the parties such agreement is to be taken from the letter of *Dimsdale*. *Dimsdale*, being the owner of the bills of exchange, writes to *Rucker* and *Grohle*, as the agents

of *Schultz*, that he is willing to hand over the bills of exchange, on receiving the bills of lading for the wheat. At that time, he being the holder of the bills, had alone the control over them; *Rucker* and *Grohle* had no right to them whatever. *Dimsdale*, therefore, might hand them over on whatever terms he thought proper, either as a security for the wheat of the plaintiff, or in payment of his private account; and if *Rucker* and *Grohle* received the bills, they had no power, after they so received them, to apply them to a different account.

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The real question is, upon what account were the bills paid? and when *Dimsdale* writes a letter directing the bills to be set off against the wheat; *Rucker* and *Grohle*, if they received the bills at all, must be taken to consent that they shall be so applied; and no letter subsequently written by them, ascribing the bills to a different account, can alter the terms on which they were originally delivered by the owner of the bills, unless he subsequently assents to such new proposal: *solvitur in modum solventis*. We think, therefore, as between the two letters put in, it is *Dimsdale's*, and *Dimsdale's* alone, which contains the terms on which the bills were delivered over, and, consequently, it was his letter only which was necessary to be stamped. This makes it unnecessary for us to give any opinion upon the points which have been argued before us on the operation of the Stamp Act.

The second ground of nonsuit rests upon the invalidity of the two bills of exchange. As to the bill drawn by *Clissold*, the objection is, that admitting a party may be bound by his acceptance written on a blank piece of stamped paper, to the extent of such sum as the stamp will cover; yet, that this giving of a blank acceptance, authorises only the party to whom it is given, to draw the bill; or, at all events, does not authorise *Clissold*, a stranger, to sign his name on the same blank piece of paper as drawer, the bill itself being subsequently written upon the paper by some other person.

No authority has been cited to us for any such restriction of the general doctrine above admitted: nor can we see any distinction in principle, where the bill has passed into the hands of third persons, between holding the acceptor liable to a given amount, when the bill is afterwards drawn in the name of the party who has obtained the acceptance, and when it is drawn by a stranger who becomes the drawer at the instance of the party to whom the acceptance is given. The blank acceptance is an acceptance of the bill which is afterwards put upon it; and it seems to follow from the doctrine of Lord Mansfield, in *Russell v. Langstaffe* (r), that it does not lie in the mouth of the acceptor to say, that the drawing or indorsing of the bill is irregular.

The acceptor was a stranger to the party to whom he handed over his blank acceptance; and as all that he desired was to raise the money, it could make no difference to him, either as to the extent of his liability, or in any other respect, whether the bill was drawn in the name of one person or another. And if the defendant is estopped from denying the right of the drawer to draw the bill, whoever he may be, he is bound by the indorsement made by such drawer, after such indorsement is proved to have been made by such drawer. As to the bill which purports to have been drawn by *Wilson*, the proof was, that it was drawn and indorsed by a real person, who signed the name *Thomas Wilson*, although his real name was *Thomas Wilson Richardson*. There were

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no circumstances proved to shew an intention to pass himself off for a different person of the name of *Thomas Wilson*, or an intention to defraud any person of that name, or any other person; and we therefore think, there is no ground for treating the signature as a forgery, or holding the bill void on that account. The present case does not carry the law further than *Cooper v. Meyer and another* (s), where the acceptor was held liable to the indorsee of a bill of exchange, he having accepted the bill drawn in the name of a fictitious person, and the bill being indorsed in the same fictitious name, the drawing and indorsing being both proved to be in the same hand-writing. We see, therefore, no reason for holding that a nonsuit ought to be entered, on either of the grounds above stated. As to that part of the motion which goes to a new trial, it is undoubtedly true, there was considerable contradiction in the evidence upon the two points in the case which it was essential for the plaintiff to establish, viz., that he gave a valuable consideration for the bills, and that he took them honestly and *bond fide*, and without the knowledge of the fraud which had been practised on the defendant in procuring his acceptance. But the points themselves were fit and proper for the discretion of the jury, and to give the proper value to evidence is particularly their province; and in this case they have exercised their discretion on the circumstances proved before them, by finding their verdict for the defendant on one of the bills, and for the plaintiff on the other two. And we cannot say that the verdict is one which is so clearly against the evidence as to authorise us, consistently with our general rules of proceeding, to send the case down to another jury. The rule, therefore, must be discharged.

Rule discharged.

(s) 10 B. & C. 468.

Jan. 28th.

IRVING v. HEATON.

In an affidavit of debt by the indorsee, against the drawer of a bill of exchange, it is not necessary to state that the acceptor has not paid the bill, or that due notice of dishonor was given to the drawer.

J. JERVIS, moved to set aside a writ of *capias*, and bail bond for irregularity. The affidavit of debt stated, "That the defendant was justly and truly indebted to the plaintiff in 50*l.*, as indorsee of a bill of exchange, drawn by the defendant upon and accepted by one *T.* for the payment of 50*l.*, to the order of the defendant at a day now past, and by the defendant indorsed to the plaintiff, and which said bill of exchange is now wholly *undue* and unpaid.

The objections were, *first*, that the date of the bill ought to have been shewn. *Secondly*, that it should have been stated that the acceptor had not paid the bill, and that due notice of dishonor had been given to the defendant: and *thirdly*, that the statement that the bill was *undue* and unpaid, was consistent with the fact of the bill not being due.

Per Curiam.—We think the affidavit is sufficient.

Rule refused (a).

(a) There are several cases where it has been held, that it is necessary to state that the bill has not been paid by the acceptor, viz., *Buckworth v. Levi*, 7 Bing. 251; *Cross v. Morgan*, 1 Dow. P. C. 123; *Banting v. Jadis*, *ib.* 445. *Simpson v. Dick*, 4 Dow. P. C. 731; *Crosby v. Clarke*, 3 Cr. M. & R. 297. On the other hand *Weedon v. Medley*, 2 Dow. P. C. 689, is in accordance with

the above decision. As the first mentioned authorities were not cited in *Weedon v. Medley*, or in the above case, it will be proper to consider them, as not having been solemnly over-ruled. That an allegation of presentment and notice is not necessary, was held in *Witham v. Gompertz*, 1 Gale, 301, where the authorities were reviewed.

GOLDING v. LA PORTE.

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WILDE, Serjt., had obtained a rule *nisi* to set aside a writ of *scire facias*, issued against the bail in this cause, and the proceedings thereon, upon two grounds: *First*, that the *ca. sa.* was issued before the judgment against the defendant had been signed: and *Secondly*, that the venue in the action was in *London*, but that no *ca. sa.* had been issued in *London*.

In *sci. fa.* against bail, irregularities in the issuing of the *ca. sa.* against the principal, may be taken advantage of, upon motion as well as by pleading.

Talfourd, Serjt., in shewing cause, admitted that the proceedings were irregular, but contended that the irregularity ought to have been objected to by pleading, and not by motion. That the irregularity might be pleaded, appears in *Dudlow v. Watchorn (a)*: and in *Philpot v. Manuel (b)*, it was held that the want of a *ca. sa.* against the principal could not be taken advantage of upon motion, but that it must be pleaded.

TINDAL, C. J.,—Here a writ of *capias ad satisfaciendum* was issued, which is good upon the face of it, and this case, is therefore, distinguishable from *Philpot v. Manuel*. It is more advantageous to the plaintiff to discuss a matter of irregularity upon motion: and as no authority has been cited to shew that this objection may not be taken upon motion, the rule must be made absolute.

Rule absolute.

(a) 16 East, 39.

(b) 5 Dow. & Ry. 615.

DOE d. MILBURN v. EDGAR (a).

EJECTMENT to recover two pieces of land in the parish of *Uphill*, in the county of *Somerset*. At the trial before *Coleridge*, J., at the last assizes for *Somerset*, the following facts were proved:—

The lessor of the plaintiff claimed to recover the premises as assignee, under the compulsory clauses of the Lords' Act (32 G. 2, c. 28, secs. 16 & 17), of one *Simon Payne*, an insolvent debtor, which assignment was executed on the 30th of *May*, 1831.

The two pieces of land had been allotted to *Payne*, under the provisions of a Local Enclosure Act, 53 G. 3, c. 102, in respect of his lands in the manor of *Uphill*. A witness named *Gegg*, under whom the defendant claimed title, proved, that in the autumn of 1813, a writing had been signed by himself and *Payne* (which was not produced,) respecting a sale of the two pieces of land, and that he had, at that time, paid *Payne* 200*l.*, and a further sum of

1. A plaintiff claiming title as assignee of an insolvent, under the compulsory clauses of the Lords' Act (32 G. 2, c. 28) need not shew that the notices required by sec. 16. to be given to creditors before the insolvent is brought up, were duly given. Proof of the assignment is sufficient.

2. When the trusts contained in the assignment were more extensive than the trusts authorised by the statute, *Held*, that the assignment was not on that account invalid.

3. Land belonging to the insolvent, and contracted to be sold, but not conveyed, will pass to the assignee, under the general words of the assignment, although in the schedule, the insolvent described his interest in the land as being a debt due from the intended purchaser.

(a) The points here reported were determined in *Michaelmas* Term. See the next case, page 437, where two other objections

were argued for the defendant in this Term, after an ineffectual attempt to compromise the proceedings.

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200*l.* on the 13th of *July*, 1814; that *Payne* wrote an authority (which was produced,) to the enclosure commissioners when the last 200*l.* was paid, and thereby directed them to put him, *Gegg*, into the possession of the two pieces of ground, and that he was accordingly put into possession thereof; *Gegg* also stated, that he had paid *Payne* interest upon 400*l.*, from the time he entered on the land until 1826.

The plaintiff proved that *Payne* had been brought up to be discharged under the *seventeenth* section of the Lords' Act, 32 G. 2, c. 28(b), and the rules of court, by which he was remanded from time to time, until he was discharged, were produced; the assignment and schedule executed by *Payne*, were also in evidence. The last rule of court under which *Payne* was discharged was as follows:—

“ In the Common Pleas.—*Trinity Term*, 1st Wm. 4th.

Alexander Milburn v. Simon Payne.

Monday, 30th *May*.—Upon reading a rule made in this cause on *Wednesday*, the 10th day of *November*, in *Michaelmas Term* last, another rule made in the cause on *Monday* last, the affidavit of *Thomas Hyde*, gentleman, sole executor of *Thomas Hyde*, one of the creditors of the defendant named in the certificate of the warden of his Majesty's prison of the *Fleet*; and the affidavit of *Ann Harris*, sole executrix of *James Harris*, another of the creditors of the defendant, named in the said certificate; and the defendant being brought into this court pursuant to the said rules, and having delivered into court upon oath a true account in writing, signed by him, of all his real and personal estates and of all incumbrances affecting the same, to the best of his knowledge and belief; and having executed an assignment thereof to the plaintiff, and to the said *Thomas Hyde*, and the said *Thomas Hyde* and *Ann Harris*, by their counsel, severally consenting: it is ordered that the defendant be discharged out of the custody of the warden of his Majesty's prison of the

(b) By 32 Geo. 2, c. 28, sec. 17, it is enacted, “ that every prisoner charged, or who shall be charged in execution, as aforesaid, and who, in pursuance of this act shall, at the desire of any of his, her, or their creditor or creditors; his, her, or their executors or administrators, be brought up to any such court, assizes, or great sessions, as aforesaid, shall, on proof being there first made of such notices as are hereinbefore directed to be given, having been given, deliver in there in open court, upon oath, within the time hereinbefore for that purpose prescribed, a full, true, and just account, disclosure and discovery, in writing, of the whole of his or her real and personal estate, and of all books, papers, writings, and securities relating thereto, and also of all incumbrances then affecting the same, and the respective times when made, to the best of his or her knowledge and belief (other than and except the necessary wearing apparel, &c., not exceeding the value of ten pounds in the whole) which account shall be subscribed with the proper name or mark of the prisoner respectively, who shall so deliver in the same; and on the deliver-

ing in of any such account, the estate and effects of every such prisoner shall be assigned and conveyed by such prisoner respectively, by a short indorsement on the back of every such account as shall be so delivered in to such person or persons as the court, judge or judges, justice or justices in which or to whom any such account shall be so given in, shall order or direct, in trust and for the benefit of the creditor or creditors, who shall have required any such prisoner to be brought up as aforesaid, and of such other creditor or creditors (if any) of every such respective prisoner, at whose suit or suits any such prisoner shall be charged in custody, or in execution in any such prison or gaol, and who shall, by any memorandum or writing, to be signed by such creditor or creditors respectively, before any such conveyance or assignment shall be made, consent to any such prisoner's being discharged out of gaol or prison, at his, her, or their suit or suits, and also agree to take or accept a proportionable dividend of such prisoner's estate and effects, with the creditor or creditors who shall have required any such prisoner to be brought up as aforesaid.”

Fleet as to the several detainers against him at the suit of the said plaintiff and the said *Thomas Hyde* and *James Harris*, pursuant to the directions of the act of parliament made for the relief of debtors with respect to the imprisonment of their persons, and to oblige debtors who shall continue in execution beyond a certain time, and for sums not exceeding what are mentioned in the act, to make discovery of, and deliver upon oath, their estates for their creditors' benefit."


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The schedule filed by *Payne* in pursuance of sec. 17 of the act, was to the following effect:—

"I am possessed of the several manors or lordships of *Uphill*, *Christon*, and *Bradford*, in the county of *Somerset*, with all rights and appurtenances thereto belonging; the manor of *Uphill*, consisting of a house and other outhouses, barns, stables, and other buildings, and many closes of land, containing several hundred acres of land; the manors of *Christon* and *Bradford*, situate at *Axbridge* and *Axbridge Hill*, in the said county of *Somerset*, consisting of many dwelling-houses, barns, stables, and other buildings, and many closes or pieces of arable, meadow, and pasture land, containing several hundred acres. I have also due to me from *John Henry Gegg*, for estates sold by *William Preest* as my trustee, the sum of 6,000*l.*, and interest; and also the sum of 800*l.* for lands sold by me to the said *J. H. Gegg*, and interest." The assignment by indorsement on the schedule was as follows:—"I the within named *Simon Payne*, in pursuance of the compulsive clauses in the several acts of parliament made and passed for the relief of debtors, with respect to the imprisonment of their persons, and no other persons having applied for any share thereof, do hereby grant, assign, transfer, and set over unto the within-named plaintiff, *Alexander Milburn*, and *Thomas Hyde*, their and each of their heirs, executors, administrators, and assigns, in trust for himself, and such other creditors at whose suit I am now charged or detained in custody, and who have consented to my discharge, all and singular the real and personal estate, whether in possession, reversion, remainder, or expectancy, and particularly all the goods, chattels, debts, credits, effects, and other property and estate which are mentioned in the within schedule, and all deeds, books, papers, and writings, and securities relating thereto. Witness my hand, this 23d day of *May*, 1831. (Signed) *S. Payne*."

"Signed, sealed, and delivered, by the above-named *Simon Payne*, in the presence of *John H. Cancellor*, one of the secondaries of the Court of Common Pleas."

Upon these facts, three objections were taken on behalf of the defendant. *First*.—That the title of the lessor of the plaintiff as assignee of *Payne* was not sufficiently proved, but that it ought to have been shewn that the notices to the creditors and the sheriff, which are required by sec. 16 of the Lords' Act were duly given. *Doe d. Perring v. Heath (c)*. *Secondly*.—That the trusts in the assignment were not conformable to the provisions of the 17th section of the statute. *Thirdly*.—That the land did not pass to the assignee, because the assignment described *Gegg* as being the owner of it.

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A verdict was found for the plaintiff, with leave reserved for the defendant to move to enter a nonsuit on the above points.

Erle having obtained a rule *nisi* accordingly,

Crowder and *Ball* shewed cause. *First*.—The title of the lessor of the plaintiff was sufficiently proved. *Doe d. Perring v. Heath* (*d*) is distinguishable. There the assignment was not made under the compulsory clauses of the act, and it was not shewn that any thing had been done by the authority of the Court. It cannot be contended that the plaintiff was bound to shew that all the notices required by the 16th section of the Lords' Act were duly given: notices are there required to be given to the insolvent—to every creditor at whose suit the prisoner is detained—and to the sheriff or gaoler of the prison in which he is confined. Insuperable difficulties would occur after a lapse of years if that argument should prevail. And by the 17th section, before the Court will discharge a prisoner, proof is required that all the notices were duly given. Mere proof of the assignment would have been sufficient, without the rules which were produced. [*Tindal*, C. J.—I cannot think it was necessary to put in those rules.]

Secondly.—The form of the assignment is sufficient. It is said, that *Hyde* and the lessor of the plaintiff, being the only persons who had consented to *Payne's* discharge, and had applied to share his effects, were therefore the only creditors who were entitled to the benefit of the assignment, and that the trusts in the assignment which was executed, are too large, because, not only *Hyde* and the lessor of the plaintiff are included to partake of the trusts, but also, "all such other creditors at whose suit the prisoner was then charged or detained in custody, and who had consented to his discharge." But this is mere surplusage. No precise form of assignment is given in any schedule attached to the statute, and the court will mould the trusts according to the justice of the case.

Thirdly.—The land is sufficiently described in the schedule. It conveys *Payne's* estates, including that of *Uphill*, and also the 800*l.* which he supposed to be due from *Gegg*, in respect of the two pieces of land. But that contract proved to be incomplete, and as the schedule only points out the sources of the insolvent's property, it must be taken that all the insolvent's estate was included. By the assignment "all and singular the real and personal estate" of the insolvent was assigned to the trustees.

Erle and *Barstow*, *contrà*.—As to the first point, *Doe d. Perring v. Heath* (*d*), is an authority to shew that the assignment was not sufficient to establish the plaintiff's title; and it is a general rule, that whenever a party shews a Statutory title, he must prove it strictly; as in the case of assignees of a bankrupt, who were obliged to prove all the proceedings in bankruptcy, until such proof was dispensed with by an express enactment (*f*). In *Davison v. Gill* (*g*), it was held, that justices were bound to observe the form of an order, as directed by a road act, although an appeal against the order had been dismissed at the sessions. That case is an authority to shew that there is no presumption of

(*d*) 2 Smith's Rep. 1.
 (*f*) 6 G. 4, c. 16, sec. 20.

(*g*) 1 East. 70.

law in favour of the proceedings of a court of record. So here the statute authorizing an assignment to be made in a court of record, does not render it unnecessary to prove that all the directions in the statute were duly observed. Again, in ejectment by a tenant by *elegit*, the judgment roll must be produced. [Tindal, C. J.—Because the award of the *elegit* is the act of the party.]

Secondly.—The assignment is defective, because the trusts are different from those which the statute points out. By the *sixteenth* section of the Lords' Act, the prisoner is to be brought up, "in order that the estate and effects of such prisoner may be divested out of him, and may, by the Court, be ordered to be assigned and conveyed in manner and for the purposes hereinafter declared." These purposes are stated in the *seventeenth* section, and it is clear that, in the present case, the assignment was not made according to the directions of the statute. The trusts are too extensive, and the insolvent would lose his right to retain any surplus which might remain after those creditors were paid, who alone ought to have been included. The estate of the insolvent, therefore, never divested out of him. If the insolvent had persisted in refusing to make an assignment of his effects, and he had been indicted for the misdemeanor, proof that he had refused to make this assignment would be insufficient to procure a conviction.

Thirdly.—The assignment did not pass the land in question, as it is not described in the schedule—if any thing passed, it was the debt due from Gegg.

TINDAL, C. J.—Three objections have been taken to the validity of this assignment. The first is, that it was not shewn that this Court had authority to order the assignment to be made; for it is contended, that all the previous notices required by the statute ought to have been proved, as well as the assignment. It would be a matter of extreme difficulty, in the case of assignments of many years' standing, to prove these notices, which would include the notice to the creditors, the gaoler, and other notices of a similar description. At the same time, if it appears, on the face of the act, that this preliminary proof is necessary, then it undoubtedly ought to have been given in this case; but I feel no difficulty in saying, that the production of the assignment, bearing the signature of an officer of the court, is sufficient evidence. The *seventeenth* section of the act directs, that, upon proof being first made of the notices having been given, that the prisoner shall deliver an account of his estate, and execute the assignment. The investigation that the proper notices were duly given was therefore a preliminary inquiry, which was requisite to enable the Court to exercise its authority. It is not necessary to say, that this production of the assignment, so attested, is of itself conclusive evidence, but we say it is sufficient if it stands unimpeached. In *Doe d. Perring v. Heath* (h), it was held that some evidence was necessary to show that the assignment was not a mere idle piece of paper. If further proof were necessary here, which I am far from thinking was the case, then the rules of court which were in evidence, clearly proved that the assignment was duly made under the authority of the Court.

Secondly, it is said that the trusts are improperly stated; that they are larger

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than the act directs. The *seventeenth* section directs that the assignment shall be made in trust for the creditor who brought the prisoner up, and for such other creditors as had consented to the prisoner's being discharged. In the present case, *Milburn* and *Hyde* had alone consented to the discharge, and undoubtedly the trust, as set forth, is larger than the act requires. But this was matter of surplusage, for no creditor could avail himself of the trust who had not, before the assignment, consented to the discharge of the prisoner, in writing; and it would be a hard case on the creditors who had consented, if, under such circumstances, they should be deprived of the benefit of the assignment. The Court would see the trusts were properly carried into effect.

The *third* objection is, that the property in the land did not pass by the schedule. I agree that it contains no particular description of the land; but there are general words in the assignment, which, although they want precision and accuracy, still must lead us to conclude that it was intended to pass the whole of the prisoner's property. The words are, "all and singular *the* (not *my*) real and personal estate which are mentioned in the within schedule." I therefore think the fair import of this was to pass all the prisoner's real and personal property, which included the land in question. The rule must be discharged (i).

GASELEE, J.—I am of the same opinion. In *Doe d. Perring v. Heath*, (j), no rules of court were produced, but here seven rules were in evidence, the last of which directed the prisoner's discharge. This last rule is very material, with reference to the first objection, because it shews that the discharge of the prisoner was the act of the Court, and that it was done after an assignment was executed to the satisfaction of the Court.

As to the objection to the assignment, it is stated to be made under the compulsory clauses in the Lords' Act; and none but those creditors who had consented to the prisoner's discharge, in writing, could have shared in the distribution of his property; and no injury could, therefore, have accrued to the prisoner.

With respect to the last objection, I am of opinion that the land passed to the assignee.

BOSANQUET, J.—I am of opinion, that it sufficiently appeared at the trial that the assignment was made under the authority of the Court. Supposing evidence of that fact to be necessary, it appeared in the rules of court which were produced, and the assignment was attested by an officer of the court. *Secondly*, I think that the manner in which the trusts are declared does not affect the validity of the assignment. The act requires that the assignment should be made by a short indorsement on the schedule; and, if it had only been of all the prisoner's estate and effects, it would have been sufficient, and the Court would have taken care to carry the trust into effect. *Thirdly*, I consider, taking into consideration the language which is used in the assignment and schedule, that it necessarily included the land.

Rule discharged (k).

(i) Mr. J. Park was at Chambers.
 (j) 2 Smith, 2.

(k) See the next case.

SAME v. SAME.

Jan. 23rd.

THE rule *nisi* mentioned in the former case was also granted on two other points which were made at the trial by the defendant's counsel; *first*, that *Gegg*, and the defendant who came into possession of the premises under him, had held adversely for more than twenty years; and, *secondly*, that it was not shewn that any award had been made by the commissioners for enclosing the common; and that the plaintiff had not, therefore, established his title. These points were raised upon the following facts, in addition to those stated in the former case. The two pieces of ground were allotted to *Simon Payne*, under a local act for enclosing the waste lands of *Uphill*. *Payne* sent a written authority to the commissioners, requesting them to put *Gegg* into possession of the premises; but no award was proved. By the 22nd section of the enclosure act, the commissioners were empowered to deliver possession of the allotments to the several persons interested in them; and it was declared, that such possession should be a good title against all persons whomsoever, notwithstanding the award of the commissioners should not have been made; and by sec. 23, a party who had agreed to purchase, should, if let into possession, have the same rights as the vendor. *Gegg* appeared to have been let into possession of the two pieces of ground under a contract for sale, at the price of 800*l.*, but no conveyance was executed; and the two sums of 200*l.* being paid, as is already stated, *Gegg* paid interest upon the remaining 400*l.* until 1826. *Gegg* became bankrupt in 1827, and his assignees sold the premises to the defendant, who had refused to deliver up the possession to the plaintiff. *Gegg* took possession of the premises on the 13th of *July*, 1814, and the present ejectment was brought on the 17th *October*, 1834.

The learned judge left it to the jury to say whether a conveyance of the premises to *Gegg* had ever been completed. Verdict for the plaintiff.

1. An estate was contracted to be sold, and the vendee paid part of the purchase-money, and entered into possession without a conveyance, paying interest on the remainder of the purchase-money from time to time:—*Held*, that his possession was not adverse, and that, after twenty years, an ejectment might be brought.

2. An inclosure act directed that a vendee let into possession of any of the allotments, should have the same rights as the vendor, *Held*, that this was only applicable to the relative rights of the vendor and vendee.

Crowder and *Ball* shewed cause against the rule which had been obtained upon the two last-mentioned objections. *First*. There was no adverse possession in this case. The defendant obtained possession under *Gegg*, and *Gegg* acknowledged the title of *Payne* up to 1826, when he last paid interest on 400*l.* It is not precisely like the case of a tenant paying rent to his landlord, but the principle is the same; for, as the contract of sale was never completed, *Gegg* was, in effect, tenant at will to *Payne*, and he might have been ejected at any time. *Right*, d. *Lewis*, v. *Beard* (a), *Doe*, d. *Newby*, v. *Jackson* (b), *Doe* d. *Miller* (c). In *Hall* v. *Doe*, d. *Sturtees* (d), where premises were mortgaged in fee, with a proviso for re-conveyance, if the principal were not paid on a given day, and in the meantime that the mortgagor should continue in possession; it was found that the principal was not paid on the given day, but that the mortgagor continued in possession; but there was no finding by the jury that interest had or had not been paid by the mortgagor; and it was held, that it must be taken that the occupation was by the permission of the mortgagee; and, consequently, that though more than twenty years had

(a) 13 East, 210.

(b) 1 B. & Cress. 448.

(c) 5 Car. & P. 595.

(d) 5 B. & A. 687.

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elapsed since default in payment of the money, still the mortgagee was not barred by the Statute of Limitations. *Abbott, C. J.*, there said—"Upon this finding I am of opinion, that this must be considered as an occupation by permission of the mortgagee; and, if so, there was no adverse possession, and the Statute of Limitations does not apply."

Secondly. The commissioners were empowered to put the party interested in the property into possession, although the award was not made; and a vendee is clothed with the same rights as the vendor. Here *Payne* gave the commissioners the authority to let *Gegg* into possession.

Erle and Barstow, contrâ.—The facts of the case disclosed that the defendant had been in possession adversely for more than twenty years. In ejectment, the lessor of the plaintiff is bound to shew that he has the legal title, and that a right of entry had accrued to him within twenty years. Here *Gegg* came into possession as vendee of the land, but not as tenant of the premises to the vendor, *Sugd. Vend. & Pur.* 231, 7th ed. The vendee remains in possession as owner, not acknowledging the title of the vendor, but claiming title in himself. The cases cited do not apply, because the vendor resumed his rights within twenty years; but here more than twenty have elapsed, and the right of the vendor is barred. If a feoffee is let into possession without livery of seisin, and he remained in possession for twenty years, the feoffer could not maintain an ejectment although he could have turned him out of possession within twenty years. As to the other point, it must be taken that, as no award was produced at the trial, none was ever made; and until the award was made, the legal estate in the premises did not vest in the allottee. *Farrar v. Billing* (e), *Ellis v. Arnison* (f), *Cane v. Baldwin* (g). *Payne* had, therefore, no title which could vest in the lessor of the plaintiff. If, on the other hand, the being let into possession as vendee, conferred the legal title, then, by the *twenty-third* section of the Statute, *Gegg* obtained the same right as the vendor himself possessed.

TINDAL, C. J.—I can see no reason for setting aside this verdict, or for granting a new trial. The case has been rested on two grounds; first, upon the argument that the land must be considered as freehold; and, secondly, upon the peculiar nature of the property as an allotment under an inclosure act. The question may be considered as if *Payne* was the lessor of the plaintiff, and *Gegg* the defendant; inasmuch as *Milburn* claims under *Payne*, and *Edgar* under *Gegg*.

It has been contended that the plaintiff is not entitled to recover, because an adverse possession has been enjoyed for more than twenty years; and the question is, whether such an adverse possession has been made out. It appears that, on the 18th of July, 1814, *Gegg*, who is now represented by the defendant, was first let into the possession of the premises under an authority signed by *Payne*, in consequence of a contract of sale which had been agreed upon between them. So far as *Gegg's* original entry is therefore concerned, he appears to have been let into possession as a purchaser, and in that character he might have had an interest distinct from the vendor; but it appears that the purchase money was not paid at the time, for 200*l.* was first paid,

(e) 2 B. & Ald. 171.
(f) 5 B. & Ald. 47.

(g) 1 Stark. N. P. C. 65.

then a further sum of 200*l.*, some months afterwards, and interest upon 400*l.* continued to be paid yearly or half-yearly until 1826. What could the jury infer from these facts but that *Gegg* was let into possession of the premises, under a contract for a purchase which was not completed? It is not disputed but that *Payne* might have maintained an ejectment within twenty years after *Gegg's* entry; and I wish to see how, during the twenty years, *Gegg's* possession was adverse, unless he had refused to quit after notice given to him, or unless he had refused to pay the interest.

It is said that the case resembles a feoffment without livery of seisin; and it is urged that a person holding under such circumstances, holds adverse possession, but that argument cannot be sustained; for *Littleton*, sec. 70, says, "If a man make a deed of feoffment to another of certain lands, and delivereth to him the deed, but not livery of seisin; in this case, he to whom the deed is made, may enter into the land, and hold and occupy it at the will of him who made the deed, because it is proved by the words of the deed that it is his will that the other should have the land; but he who made the deed may put him out when it pleaseth him;" and Lord *Coke* says, in commenting on the same section, "It appeareth that if the feoffee doth enter, he is tenant-at-will, because he entereth by the consent of the feoffor." Therefore it seems to me that the case put makes against and not in favor of the position contended for; and the payment of the interest was evidence that *Gegg* remained in possession by the owner's permission, and twenty years have not elapsed since interest has ceased to be paid.

Secondly, it is said that, under the peculiar circumstances of the case, the plaintiff is not entitled to recover the premises. In 1813 an inclosure act had passed, and no award was proved to have been made; but the allotments made in favour of *Payne* had been ascertained. Now, under the *twenty-third* section of the act, it is enacted, that a party who has agreed to purchase shall, if let into possession, have the same rights as the vendor; and, it is said, that as no award was made by which the property was given to *Payne*, that he has no title to maintain this ejectment. The first answer to this is, that this argument would be as strong a fortnight after *Gegg* went into possession, as at the end of twenty years; and yet it is admitted, that if *Gegg* was let in as a purchaser, the vendor might have ejected him. Again, if it is established that *Gegg* entered by the authority of *Payne*, and that he had not an adverse possession, then it does not lie in his mouth to say that *Payne* had no title—it is like the case of a purchaser, who, being let into possession by the seller, cannot insist upon keeping possession upon the ground that the seller has no title. The *twenty-third* section was not inserted to raise questions between the vendor and vendee, but to put the vendee in the same situation as upon an allotment made to himself. The jury having, therefore, given a verdict for the plaintiff, I cannot see any ground for disturbing it.

PARK, J.—I am of the same opinion, I will only add that *Doe d. Newby v. Jackson* (A) strongly confirms our decision.

GASELEE, J., concurred.

BOSANQUET, J.—The jury have found that there was no adverse possession

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for twenty years, and I am of opinion that the facts authorised the verdict. The estate was contracted to be sold, part of the purchase money was paid but part was not paid, and the intended purchaser paid interest on the remainder of the purchase money. The party was let into possession by the vendor, and he was not a trespasser until the possession was demanded; if a demand had been made and disobeyed, then the party would have been a trespasser; but no demand of possession was made, and the vendee must therefore be treated as being in possession by the permission of the vendor, and not adversely (i). The next question arises upon the Inclosure Act, and I will only add one observation:—It is said that, by the twenty-third section, the party who purchases is entitled to all the rights of the vendor; but suppose, instead of having purchased in fee, the vendee had only an agreement for a lease of the lands for seven years, or for one year, then, if the argument was well founded, he would have all the rights of the owner in fee. Here the interest of the party in possession, without any conveyance, was inferior to that of a lessee from year to year.

Rule discharged.

(i) See *Ball v. Cullimore*, 1 Gale, 96.

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A testator devised lands to his wife and trustees, in fee, in trust for his wife for life, and after her decease for the use of his three children for their lives, in equal shares, and to the issue of their bodies for their respective life only, in equal shares for ever; and in case of the death of either of the three children, without issue, then, upon trust, for the survivors or survivor, in equal shares, for life only, or to their respective lawful issues, in equal shares, for life only; and in case there should be only one child then living, in trust, for such only child for life only, and the issue of such only child for life, in equal shares; and if but one issue of such child, to such issue for life only, and the heir of his or her body, for ever; and, in case there should be no issue of such child, then remainders over; and it was declared that either child who should marry should have a power to make a settlement of his share for the lives of the parties, and the lives of their issue, with remainders over in tail. By a codicil which recited the above devise, the testator, after the decease of his wife, devised the same land to the trustees, in fee, in trust, for his three children, as tenants in common for the term of ninety-nine years from his decease, if they or either of them should so long live; and after the determination of, and subject to that term, to the trustees, in fee, to preserve contingent remainders; and the uses expressed in the will were to be carried into perfect execution:—*Held*, that the three children of the testator took estates for the term of ninety-nine years, if they should so long live, as tenants in common, with remainder to the trustees and their heirs, during the respective lives of the said three children, in trust, to preserve contingent remainders, with remainder to the said three children, as tenants in common, in tail general, with cross remainders between them in tail general.

THIS was a case directed by the *Vice-Chancellor* for the opinion of the judges of this Court.

Thomas Brooke, Esq., was at the time of his death seized in fee simple of divers freehold and copyhold estates, and among them of the *Upper Horton Manor* and estate, and the *Lower Horton Manor* and estate; and was also possessed of divers leasehold and personal estates of considerable value; and the said *T. Brooke* duly made his will, dated the 26th of *September*, 1807; and thereby gave, devised, and bequeathed unto his wife, *Frances Brooke*, his friends, *H. Bengough*, *G. Whittington*, and *S. Rich*, all his freehold and leasehold estates, situate in *Yate* and other parishes particularly described, upon trust, to dispose thereof, and out of the money to pay his debts, and to pay the surplus to his residuary legatees after named; and concerning the manor of *Upper Horton* (except the estate called *Cydes Mill*), he gave and devised the same unto his said wife, *Frances Brooke*, *H. Bengough*, *G. Whittington*, and *S. Rich*, to hold to them and the survivors or survivor of them his or her heirs and assigns, for ever, in trust to permit and suffer

his said wife and her assigns to receive and take the rents thereof for her life; but if she should marry, then he revoked the devise in her favour, and in lieu thereof directed his said trustees to receive the rents of the said manor, and out of the same to pay to his said wife the yearly sum of 500*l.* during her life; and upon trust that his said trustees should pay and divide all the residue of such rents to his three children, *Fitzherbert, Thomas*, and *Frances Elizabeth Brooke*, in equal parts, during the life of his said wife; but in case of either of their deaths, without lawful issue, then upon trust to pay the share of such of them so dying to the survivors of them, in equal shares; * and in case of either of them so dying, leaving lawful issue, then upon trust to pay such share to the issue of such of them so dying, in equal shares; after the decease of his said wife, he gave and devised the same manors, in *Upper Horton*, unto his said trustees and the survivors or survivor of them, their or his heirs or assigns, for ever, expressly as devisees to uses, and not as trustees, of the legal estate, upon trust for the use and benefit of his said three children, *Fitzherbert, Thomas*, and *Frances Elizabeth*, for their respective lives, in equal shares, and to the lawful issue of their respective bodies for their respective life only, in equal shares, for ever; and as to the share and interest of his said three children, and their respective issues, in the said manor and premises, for life only, subject to the provisos and conditions in his said will mentioned; and in case of the death of any or either of his said children, without lawful issue, then upon trust for the survivors or survivor of them, in equal shares, for life only, or to their respective lawful issues, in equal shares, for life only; and in case there shall be only one child then living, then upon trust for such only child, for life only, and for the lawful issue of such only child for life, in equal shares; and if but one child of such issue, then to such only child's issue, for life only, and the heir of his or her body for ever; but in case there should not be any lawful issue of such child, or the grandchild of such issue, then upon trust for such person or persons, and for such estate and estates, of and in the said hereditaments and premises, as his said wife should by deed or will grant and devise the same hereditaments and premises, in such manner and form, and for such estate and estates, as she should think fit, it being his wish that she should give or grant the same to some of his family; but in case his said wife should not make any such devise or grant thereof, then upon trust; and he gave and devised the same hereditaments and premises to and for his nephews, *Thomas Brooke* and *William Brooke*, sons of his late brothers, *Richard Brooke* and *William Brooke*, and their assigns, in equal shares, for life only, and on their deaths to the lawful issue of their respective bodies as to the share of each of them for ever, subject to the provisos and conditions therein mentioned. And the testator empowered the said *Fitzherbert* and the said *Frances Elizabeth*, with the consent of his wife, to make a settlement of his or her share in his said manor on their respective marriages, such settlement to be made for the life only of the wife or husband of the said *Fitzherbert* and *Frances Elizabeth*, and to and for the lawful issue of his or her children for their lives only, and to the lawful issue of their respective bodies, in equal shares, for ever; but in case there should not be any such lawful issue, then in trust, and to and for and upon the uses, ends, intents, and purposes, thereinbefore mentioned, and to no other use whatsoever. And the testator declared that, in case either of his said three children, or the issue of their respective bodies, should be so imprudent as to run into debt, and be under the necessity of raising money

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for his, her, or their support, that such child or issue should not mortgage or sell his estate, in the said manor, for any longer or greater term than for his or her life only, unless it should be to a brother, or sister, or the issue of such brother or sister; nor should the same be subject to any sale, mortgage, judgment, assignment, bond, or other debt, or security whatsoever that should be made, contracted for, or given them, or either of them, unless the same should be made and given to a brother or sister, or the issue of such brother or sister, nor for any longer term, estate, or interest, than for the life or lives of the person or persons making such sale, mortgage, or security, or for the payment of any debts whatsoever; and the testator declared that all such sale or mortgage, except as aforesaid, should be void, it being his most earnest request, and his express desire, to his said children, that they should keep the said manors in his family so long as there should be found one of them living; and that the survivors or survivor of the said children, and their lawful issue, should take the benefit and interest in the said manor, notwithstanding any sale, mortgage, or security, should be made thereof by either of his said children, or their lawful issue, longer than for life only, and that the same should be held and enjoyed by the survivors or survivor clear of such sale, mortgage, or security, any thing therein, or in the law provided or declared to the contrary*; also, the testator gave and devised to his daughter, *Frances Elizabeth Brooke*, his farm, called the *Mill Estate*, formerly called *Gydes*, situate in the manor of *Upper Horton* aforesaid (being a farm which was parcel of demesnes of the *Upper Horton Manor*,) to hold to her, her heirs, and assigns, for ever; and the testator reciting that he did, in 1805, acknowledge and levy a fine, with proclamations, of the manor of *Horton*, he did, by his will, declare the use of the said fine to be and enure, and he gave and devised the same to the use of his said wife, *H. Bengough*, *G. Whittington*, and *S. Rich*, their heirs and assigns, for ever, upon trust, to pay and discharge the remainder of his debts; and, in the next place, to pay the annuities thereby made payable from the same, and after the payment thereof, then, upon trust, to permit and suffer my said wife and her assigns to receive and take the rents and profits of all the remainder thereof for and during the term of her natural life, subject to the payment of the annuities after-mentioned to my respective two children during her life; and if his said wife should marry again, then the testator revoked the devise thereinbefore made to her, and in lieu thereof, directed his said trustees to receive the rents of the said manor, subject to the payment of the said annuities; and out of the remainder thereof to pay his said wife for her use the yearly sum of 500*l.* for her life; and after the payment of the said annuities, then, upon trust, that his trustees should pay all the residue of such rents to his said three children during the life of his wife, with benefit of survivorship, if either of them should die without issue; and, after the decease of his wife, he gave and devised the same manor unto the said *H. Bengough*, *G. Whittington*, and *S. Rich*, upon trust, to preserve the contingent use and uses thereof from being destroyed, upon the same trusts, as are hereinbefore declared concerning the *Upper Horton Manor*, with a similar declaration for making settlements and mortgages for life only (a). And as to all the rest of his lands, whether freehold or copyhold, not before disposed of, and also all his per-

(a) The trusts and powers contained between the * * were here repeated.

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sonal property, the testator gave and bequeathed the same unto his said wife, and the said trustees, and the survivors or survivor of them, their heirs, executors, or administrators, and assigns, for ever, upon trust, to pay certain legacies; and the remainder thereof he gave and bequeathed to his said wife and children, their executors, administrators, and assigns, in equal shares; and the said testator made his said wife sole executrix of his said will.

The said testator afterwards made a codicil to his said will, dated the 30th of May, 1811, and thereby after reciting the devise to his said daughter, *Frances Elizabeth Brooke*, of the Mill Farm, called *Gydes*, he revoked such devise, and thereby gave unto his said daughter certain lands, in *Frampton Cotterell*, in fee; and after reciting that he had, by an indenture, dated the 1st of May, 1810, granted unto his son, *Fitzherbert Brooke*, and *Theresa* his wife, his said farm, called *Mill Farm* (being, in fact, *Gydes*), to hold unto them, for their lives, and during the life of the survivor of them, his, or her assigns, the said testator confirmed the said indenture; and immediately after the several deceases of his said son and his wife, he ordered and directed the whole of the premises so granted by the said indenture to be, in every respect, and in all events, esteemed and taken as part of the residuum of his estate and effects, and, from time to time, used and enjoyed by the person and persons who, under and by virtue of the general residuary clause or devise in his said will, should be entitled to his manor of *Upper Horton*.

The said testator afterwards made a second codicil to his said will, dated the 12th of July, 1811, which, after reciting the aforesaid devise in his said will, from and immediately after the decease of his said wife, of the said manor of *Upper Horton*; and after reciting the aforesaid gift, in the said will, from and immediately after the decease of his said wife, of the said *Lower Horton* manor and estate, proceeded as follows:—From and immediately after the decease of his said wife, he gave and devised his said manors and premises unto the said *H. Bengough*, *G. Whittington*, and *S. Rich*, and their heirs, and to and for the equal use and behoof of his said three children, as tenants in common, for the term of ninety-nine years, to be computed from the day of his decease, if his said three children, or either of them, should happen so long to live; and from and immediately after the determination of the said term, and in the meantime subject thereto, to the use of the said *H. B.*, *G. W.*, and *S. R.*, and the survivors or survivor of them or his heirs during the respective lives of his said three children, in trust, to preserve the contingent uses and remainders mentioned and expressed in his said will, and also subject to the provisoes and conditions, and declarations therein contained, with a proviso, that whilst his said daughter, *Frances Elizabeth*, should remain unmarried, it should be lawful for her, by her will, executed and attested, to give and devise one-third part of his said manors and premises, or any portion thereof, in fee, for life, or otherwise, to any person or persons she might think proper; and that such gift or devise should have full operation and effect, notwithstanding any or either of the provisoes, conditions, limitations, or declarations, to the contrary in his said will: but that immediately on the marriage of his said daughter, she should cease to have any disposing power, and the will she might have made previous to her marriage, should be utterly null and void. The said testator, by two further codicils, appointed *Charles James* and *George Rolph*, trustees of his said will, instead of the said *Stiles Rich* and *George Whittington*.

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The testator died in *September*, 1813, and he left his widow, and three children, namely, *Fitzherbert Brooke*, his eldest son and heir-at-law, *Thomas Brooke*, and *Frances Elizabeth Brooke*, all since deceased, him surviving. The said *F. Brooke* duly proved the said will and codicils.

The said *F. Brooke* and *Charles James* who died in her life time on the 5th day of *July*, 1818, alone acted in the execution of the said testator's will and codicils; and by deed-poll, dated the 8th of *May*, 1815, the said *G. Rolph* and *H. Bengough* disclaimed all their right and interest in the estates devised to them as aforesaid; the said *G. Rolph* and *H. Bengough* respectively died in the lifetime of the said *Frances Brooke*. The said *Charles James* survived the said *G. Rolph* and *H. Bengough*, and died intestate, leaving an eldest son his heir-at-law. The said *Frances Brooke* continued the widow of the testator until her decease, and the said *Frances Brooke* and *Charles James* sold the said freehold and leasehold estates, situate in the parishes of *Yate*, and other parishes as before-mentioned, in trust, for sale as aforesaid, and with the produce of such sale, and the personal estate of the testator, paid all his debts; and the said *Frances Brooke* duly paid the annuities as long as the same continued payable. The testator was not at the time of making his will, and first and second codicils, and of his death, seized of any hereditaments and premises, in the parishes of *Frampton Cotterell*, other than those devised by the said first codicil to the said *Frances Elizabeth Brooke* in fee-simple. The said *Frances Elizabeth Brooke*, the daughter of the said testator, continued unmarried to the time of his death, and she had not any property in *Upper Horton* other than the said manor of *Upper Horton*, and she made her will, dated the 23rd of *April*, 1816; and thereby she gave and devised all her then present and future right and interest in the manor and parish of *Upper Horton*, and also all her messuages and premises, in *Chipping Sodbury* and *Frampton Cotterell*, and all her personal estate unto her mother, *Frances Brooke*, her heirs, executors, and administrators. The said *Frances Elizabeth Brooke* died 25th of *May*, 1820. The said *Fitzherbert Brooke*, eldest son and heir-at-law of the said testator, on the 29th of *March*, 1810, intermarried with *Theresa Frances Ansley*, who died on the 6th of *March*, 1830, and there was issue of such marriage five children, *Fitzherbert Huntley Brooke*, his eldest son and heir-at-law, born 5th of *November*, 1815; the defendant, *Richard Brooke*, now *Richard Brooke Jones*, born on the 8th of *July*, 1816, and became, on the death of the said *Fitzherbert Huntley Brooke*, and is now the heir-at-law of the said testator; the defendant, *Theresa Frances Cox Brooke*, born 13th of *December*, 1810; the defendant, *Frances Sarah Brooke*, born 4th of *February*, 1812; and the defendant, *Lucy Lucinda Brooke*, born 20th of *March*, 1818. The said *Fitzherbert Brooke* died in *March*, 1825, and he left his said five children him surviving. The said *Fitzherbert Huntley Brooke*, the eldest son of the said *Fitzherbert Brooke*, died 15th of *November*, 1830, an infant and unmarried. The said *Thomas Brooke*, son of the said testator, had four children, viz. *Thomas Richard Brooke*, the plaintiff, born 16th of *June*, 1811; the defendant, *Isabella Frances Brooke*, born 9th of *May*, 1807; and the defendant, *Elizabeth Brooke*, born 6th of *September*, 1812; and the said *Thomas Brooke*, the son of the testator, died in *February*, 1830. The said *Frances Brooke*, the widow of the said testator, being seized of divers freehold estates, made her will, dated 29th of *September*, 1830, and thereby

gave, devised, and bequeathed all the residue of her estate, both real and personal, unto all her said grandchildren, equally between them and their several heirs, executors, and administrators, as tenants in common. The said *Frances Brooke*, the testatrix, died on the 20th of *February*, 1832; and the grandchildren, who survived her, are the defendants, *Richard Brooke Jones*, her heir-at-law, *Theresa Frances Cox Brooke*, *Frances Sarah Brooke*, and *Lucy Lucinda Brooke*, the children of the said *Fitzherbert Brooke*, and the plaintiff, *Thomas Richard Brooke*, and the said defendants, *Isabella Frances Brooke* and *Elizabeth Brooke*, none of whom have ever been married.

The questions for the consideration of the Court are :—

1st.—What estate the said testator's said three children, *Fitzherbert Brooke*, *Thomas Brooke*, and *Frances Elizabeth Brooke*, respectively took under the the said will, and first and second codicils of the testator, in *Upper Horton* manor and estate.

2nd.—Whether the said *Fitzherbert Brooke*, *Thomas Brooke*, and *Frances Elizabeth Brooke*, respectively took any, and what estates, under the said testator's said will, and first and second codicils, in that part of the *Upper Horton* estates, called the *Mill Farm*, formerly *Gydes*, and in the mill also, called *Gydes Mill*.

3rd.—Whether the plaintiff, *Thomas Richard Brooke*, and the said defendant, *Richard Brooke Jones*, respectively, are entitled to any and what estate and interest, in the said *Upper Horton* manor and estate, and the *Mill Farm*, or any and what parts thereof, under the said will and first and second codicils, and in any, and what character?

4th.—Whether the defendants, *Theresa Frances Coxe Brooke*, *Frances Sarah Brooke*, *Lucy Lucinda Brooke*, *Isabella Frances Brooke*, and *Elizabeth Brooke*, or any, and which of them, are entitled respectively under the said will, and first and second codicils of the said testator, to any and what estates and interests in the said *Upper Horton* manor and estate, and the said *Mill Farm*, or any, and what part thereof?

5th.—What legal estate and interest had the said *Frances Brooke*, as the surviving trustee, under the said will and codicils of the said testator, in the *Lower Horton* estate, or in any and what part thereof at the time of making her will, and death, and in whom did such estate and interest vest upon her death?

6th.—Whether the will of the said *Frances Elizabeth Brooke* operated as an appointment in exercise of her power over her one-third part of the *Upper Horton* manor and estate?

7th.—Whether after the death of *Frances Brooke*, the heir-at-law of *Charles James*, had any and what legal estate under the said will and codicils of the said testator, in the *Lower Horton* estate, or in any and what part thereof?

8th.—Whether any and what estate or interest in the *Upper Horton* manor and estate passed under the residuary devise in the said testator's will?

Preston, for the plaintiff, *T. R. Brook*.—The will ought to be considered with a view to what the testator's intention was at the time he made it, and it is obvious that he then intended to create estates tail. His wish was to create perpetual estates for life, but as that cannot be permitted, the object of every part of the instrument will be best preserved if the court determine that

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as to the *Upper Horton* manor, the three children of the testator took estates for the term of ninety-nine years, if they should respectively so long live, as tenants in common, with remainder to the trustees in the second codicil named, and their heirs, during the respective lives of the said three children, in trust to preserve contingent remainders, with remainder to the said three children as tenants in common in tail general, with cross-remainders between them in tail general. Every part of the will is thus preserved. *Doe d. Small v. Allen* (b), decides in effect, that this is an estate tail; and *Mortimer v. West* (c) is in substance like this case. That was a devise to A. B. and C. share and share alike, for their lives, with remainder to their respective children for their lives, and so to be continued from issue to issue for life, but if any of them should die, leaving no issue, their shares were directed to go to the survivors for their lives, and the issue of such of them as should be dead, and for default of any issue, then over; and it was held, that A. B. and C. took estates tail with cross remainders. *Seaward v. Willcock* (d), and *Humberstone v. Humberstone* (e), may be cited on the other side, but the first was a case *sui generis*; and the latter was an executory trust which a Court of Equity could mould, but which a Court of Law cannot do.

Second.—It is material to observe, that the testator described the *Mill Farm*, called *Gydes*, as being part of his manor of *Upper Horton*; therefore, when the devise of that farm to his daughter was revoked, it formed part of the manor of *Upper Horton*, and must be held to be subject to the same trusts. It is clear that the residuary legatees are not entitled to take this property.

Fifth.—(f) It is manifest that the legal estate must be given to *Frances Brooke*, and the safest construction will be, that the fee passed to her as the survivor. *Charles James*, the survivor of the other trustee in fee, died in her lifetime. When general words are sufficient to pass a trust estate, was luminously considered by *Lord Eldon* in *Lord Braybrooke v. Inskip* (g), and *Esparte Morgan* (h).

Sixth.—The will of *Frances Elizabeth Brooke* operated as an appointment in favour of her mother of her third part of the manor of *Upper Horton*. Authorities are not necessary to support that proposition.

W. H. Watson appeared for *Richard Brooke Jones*; he was allowed to cite the following cases:—*Robinson v. Robinson* (i), *Doe d. Blandford v. Applin* (j), *Doe d. Candler v. Smith* (k), *Doe d. Dodson v. Grew* (l), *Doe d. Cotton v. Stenlake* (m), *Doe d. Gallini v. Gallini* (n), and *Murthwaite v. Jenkinson* (o).

Bompas, Serjt.,—for the two daughters of the testator's second son.—The testator's children took estates for life for ninety-nine years, with remainder in tail to their issue, with cross remainders over. The case has been argued as if the will stood alone without the codicil, but the whole ought to be construed together, and then it will be seen that the limitations

- (b) 8 T. R. 497.
- (c) 2 Simons, 274.
- (d) 5 East. 198.
- (e) 1 P. Wms. 332.
- (f) The other questions were not the subject of discussion.
- (g) 8 Vesey, 417.
- (h) 10 Ib. 100.

- (i) 1 Burr. 48.
- (j) 4 T. R. 82.
- (k) 7 T. R. 531.
- (l) 2 Wils. 322.
- (m) 12 East. 515.
- (n) 5 B. & Ado. 640.
- (o) 2 B. & Cress. 357.

to the grand children come within the rule in *Shelly's* case. The general intention of the testator was to limit the estate so far as the law would allow him. In all the cases which were cited on the other side, a life estate, and not a term for years, was granted to the persons who stood in the relation of the testator's children. *Mogg v. Mogg* (p).

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Hayes, on the same side, was allowed to mention *Somerville v. Lethbridge* (q), and *Beard v. Westcott* (r).

Preston, was heard in reply, and he cited *Arnold v. Congreve* (s).

The following certificate was sent in during the present Term :—

We have heard this case argued by counsel, and have considered it; and in answer to the several questions submitted to us, we are of opinion,—

First.—That under the said will and the first and second codicils, the three children of the testator took in the *Upper Horton* manor and property, estates for the term of ninety-nine years, if they should respectively so long live, as tenants in common, with remainder to the trustees in the second codicil named, and their heirs during the respective lives of the said three children, in trust to preserve contingent remainders, with remainder to the said three children as tenants in common in tail general, with cross remainders between them in tail general.

Secondly.—We are of opinion that the three children of the testator took, under the will and the first and second codicils, the same estate in the *Mill Farm*, (in the will called *Gydes Mill*), as they took in the *Upper Horton* estate.

Thirdly and fourthly.—We are of opinion that the grandchildren named in the third and fourth questions respectively, took nothing under the will and first and second codicils in the said *Upper Horton* manor and estate, or the said *Mill Farm*.

Fifthly.—We are of opinion that the legal estate and interest which *Frances Brooke* had as surviving trustee, under the will and codicils of the testator in the *Lower Horton* estate, at the time of making her will, was an estate for life only; and that upon her death the legal remainder in fee came to the heir-at-law of *Charles James*, the last surviving trustee of the fee.

Sixthly.—We are of opinion that the will of *Frances Elizabeth Brooke*, did operate as an appointment in exercise of the power over her one third part of the *Upper Horton* manor and estate.

Seventhly.—We are of opinion that on the death of *Frances Brooke*, the heir-at-law of *Charles James* took the legal estate in fee in the *Lower Horton* estate.

Eighthly.—We are of opinion that no part of the *Upper Horton* manor and estate, passed under the residuary devise in the testator's will.

N. C. TINDAL,
J. A. PARK,
S. GASELEE,
J. VAUGHAN,

(p) 1 Merivale, 654.
(q) 6 T. R. 213.

(r) 5 Taunt. 323.
(s) 1 Russell & Mylne, 209.

Feb. 1st.

SIMPSON v. COOPER.

Before the regular time of pleading had expired, the defendant obtained an order for seven days' time to plead, the defendant then being under terms to take short notice of trial at the sittings, *Held*, that the further time ought to be reckoned from the date of the order, as the cause could not otherwise be tried at the sittings.

THE declaration in this case was delivered on the 12th of *January*; on the following day the defendant obtained a judges' order for seven days time to plead; the defendant having, at that time, undertaken to take short notice of trial at the second sittings in *Hilary* Term, which would fall on the 26th of *January*: the defendant not having pleaded at the expiration of seven days from the 13th of *January*, the plaintiff signed judgment, and a rule *nisi* to set it aside for irregularity having been obtained,

Wilde, Serjt., shewed cause.—As the defendant was bound to take short notice of trial, it is clear that the seven days' time must be reckoned from the *thirteenth* of *January*, and not from the expiration of the four days after declaration; otherwise the plaintiff could not try the cause at the second sittings, and this distinguishes the case from *Aspinall v. Smyth* (a). This is not an order, as is sometimes the case, "for further time to plead."

Andrews, Serjt., *contrà*.—The judgment is irregular, for the defendant's time to plead did not expire until seven days after the expiration of the regular four days which is allowed for pleading.

TINDAL, C. J.—I think we are called upon to say that the intention of this order was, that the defendant should have seven days time to plead from the date of the order. It is contended for the defendant, that he had three days further time, but that would bring the time of pleading to *Monday*, the 25th of *January*, and the following day was the sittings, and the defendant was bound to take short notice of trial. I therefore think, in this particular order, that the time allowed was seven days from the date of the order.

The other judges concurred.

Rule discharged.

(a) 2 B. Moore, 655.

Jan. 14th.

ABBOTT & an^r., ass^{es}. of FLUDE, a bankrupt, v. BURBAGE and another.

A. & B., joint traders, entered into a deed of composition with their joint creditors, whereby it was agreed, that the traders should remain in possession of the joint stock-in-trade, and that the creditors should receive 4s. 6d. in the pound, payable by instalments; and the separate property of A., consisting of a policy of insurance on his life, was assigned to trustees as a security for the payment of the instalments. *Held*, that this was not an act of bankruptcy to support a fiat against A.; and that it was properly left to the Jury to say, whether the deed was executed by A. in contemplation of bankruptcy, with intent to defraud his separate creditors.

TROVER to recover a policy of insurance for 3,000*l.* effected upon the life of the bankrupt. The cause was tried at *Guildhall*, before *Tindal*, C. J., at the sittings after *Michaelmas* Term, when it appeared that the defendants were trustees of a deed of assignment, dated the 27th of *December*, 1831, made by *Flude* the bankrupt and his then partner *Simpson*, under the following circumstances:—Previous to 1831, *Flude* and *Simpson* were partners in *London* as wine merchants, and in the course of that year they became embarrassed,

as wine merchants, and in the course of that year they became embarrassed,

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and the creditors of the firm consented to receive 4s. 6d. in the pound, payable by three instalments, at six, nine, and twelve months date. The deed of the 27th of December 1831, was executed by the joint creditors and *Flude* and *Simpson*, for the purpose of carrying this arrangement into effect; and the separate property of *Flude*, consisting of the policy in question and of his household furniture was assigned to the trustees. The deed provided that *Flude* and *Simpson* should be allowed to carry on their business as usual; that the policy, with other policies, should be a security for the payment of the instalments, and that after these were paid, the surplus should be given to *Flude's* representatives. It was also provided that the future premiums on the policies should be paid out of the monies received by the trustees from *Flude* and *Simpson*.

At this time *Flude* was indebted to a considerable amount on his separate account, but his private creditors were not parties to the arrangement made with the joint creditors.

Flude and *Simpson* carried on their business for a twelvemonth after this arrangement was made, and paid the two first instalments provided for by the deed, but they were unable to pay the third. *Simpson* proved, that when the arrangement was made, he and his partner supposed they should be able to retrieve their affairs. On the 19th of November, 1833, a fiat in bankruptcy issued against *Flude*, on the petition of one of his separate creditors, and the plaintiffs were appointed assignees, and it was contended that the execution of the deed of assignment in 1831, in favour of the joint creditors of the estate, under the circumstances stated, was an act of bankruptcy, and that the assignment was void, as being made by way of fraudulent preference of the joint creditors.

The learned Judge left it to the Jury to say, whether the deed of assignment of *Flude's* effects was made to enable the parties to carry on their business, or whether it was made by *Flude* by way of fraudulent preference and in contemplation of bankruptcy. Verdict for the defendants.

Kelly applied for a rule *nisi* for a new trial, upon the ground of misdirection. It is quite clear that the parties were in a state of insolvency when the deed of assignment was executed, and the attention of the jury ought to have been called to that circumstance, which would have shewn that bankruptcy must have been in the contemplation of the partners when the deed was executed.—[*Tindal*, C. J.—The intention of the parties was a question for the jury.] That is so; but they should have been told at least, that bankruptcy was in a high degree probable. *Morgan v. Horseman* (a), *Linton v. Bartlett* (b).

TINDAL, C. J.—The grounds upon which this application is made are two: *First*, that the state of affairs when the deed was executed, was not sufficiently placed before the jury; and *Secondly*, that the jury were not told expressly that bankruptcy was in the highest degree probable.

The act of bankruptcy is put in a double way: *First*, that the deed of December, 1831, was a fraudulent grant to defeat or delay creditors; and *Secondly* that it was a voluntary preference of joint creditors, made with the object of defeating the claims of the separate creditors. The first objection arises on

(a) 3 Taunt, 241.

(b) 3 Wils. 47.

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the *third* section of the Bankrupt Act, which enacts "That if any trader shall make, or cause to be made, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, with intent to defeat or delay his creditors, such trader shall be deemed thereby to have committed an act of bankruptcy." Now two circumstances are here essential; *first*, a fraudulent grant; and *secondly*, it must be made with intent to defeat or delay creditors. Looking at the instrument upon which the objection is founded in the present case, so far from its being a grant of goods, it is an agreement between the parties, that the traders shall hold all their stock in trade and effects, and that the creditors shall accept four shillings and sixpence in the pound by instalments, in satisfaction of their debts; and at the end of the deed certain policies on the life of one of the partners are assigned to trustees, as a further security for the due payment of the instalments as they should become due.

What then appears to have been the intent of the parties? The debts of the joint creditors were of a larger amount than those of the separate creditors, and the former could take no remedy against the partners, until default had been made in payment of the instalments, whilst the latter remained at liberty to take proceedings to recover their debts from the bankrupt. As to the assignment of the policy, that is not of itself a grant by which *Flude's* creditors could be defeated or delayed.

But this is not the only answer; for *Simpson* was called at the trial, and he stated that the partners supposed, that when they were in possession of the stock in trade, and were released from the demands of the joint creditors, they should be enabled to go on with their business; therefore, I think the jury were well warranted in saying that no intent to defraud or delay the creditors of *Flude* was made out. As to the insolvency of the parties, the whole of the evidence was stated to the jury, and I see no reason why it should be pressed upon them more closely, than the other parts of the case. With regard to the second point, it was left to the jury to say whether there was any preference made in contemplation of bankruptcy, and they were asked;—*first*, whether it was a voluntary preference; and *secondly*, whether it was made in contemplation of bankruptcy. It appeared that no fiat was issued until two years after the execution of the deed; and the question for the jury was whether the parties contemplated bankruptcy as being probable, and the effect of *Simpson's* evidence was, that the parties considered at the time, that if they were left in possession of the stock they would be enabled to continue their business.

PARK, J.—The questions were, whether the deed was fraudulent, and whether it was made with intent to defeat or delay the creditors: both must concur, and these were questions for the jury, and their decision was in accordance with the opinion of my Lord Chief Justice.

GASELER, J., concurred.

BOSANQUET, J.—These parties were endeavouring to avoid a bankruptcy, and made arrangements to do so, by coming to an agreement with their creditors. It appears, however, that they could not retrieve their affairs.

Rule refused (c).

(c) *Atkinson v. Brindle*, ante, 337.

BATTERSBY, Treasurer of the Bristol Dock Company, v.
KIRK.

ASSUMPSIT for rates and duties payable from the defendant to the *Bristol Dock Company*, for goods, wares, and merchandize, imported into *Bristol*, consigned to the defendant. The defendant pleaded *non-assumpsit*, under a judge's order, empowering the defendant under that plea, to give in evidence any matter of defence. The particulars of demand claimed the sum of 5*s.* 1*d.* for rates and duties on two boxes of *Irish* linen, imported into *Bristol*, by the *Express* steam packet from *Dublin*. Under a judge's order, the facts were stated for the opinion of the court in the following *CASE*:—

By stat. 43 G. 3, c. cxi., a company of proprietors, to be known by the style of "*The Bristol Dock Company*" was established, and they were invested with various powers and authorities, to enable them to fulfil the objects of the act; and certain rates and duties were thereby made payable to the company, for all goods imported from parts beyond the seas, but not brought coastwise, or by inland navigation into the port of *Bristol*, except articles of provision.

By stat. 46 G. 3, c. xxxv, the former act was recited, and various further provisions were made for carrying it into effect.

By stat. 48, G. 3, c. xi, the former acts herein-before stated were recited, and further provisions were made, and further works directed. The *thirty-eighth* section of the last mentioned statute, was as follows:—"And be it further enacted, that from and after the completion of the said intended works as aforesaid, there shall be paid and payable to the said company, or their collectors or deputies for their use, (in lieu of the rates on merchandize imposed by the said first recited act), for all goods, wares, or merchandizes imported from parts beyond the seas, and not brought by inland navigation into the port of *Bristol*, (except corn, flour, rice, and other articles of provision); and also for all goods, wares, and merchandize that shall be brought coastwise into the said port, of foreign growth or importation, but not of British growth or manufacture, (except from *Cardiff*, *Newport*, and other ports to the eastward of the *Holmes*, and except corn, flour, rice, and other articles of provision; and except foreign goods brought coastwise, which shall not be discharged for sale at the quays, but passing or going to or from the *Bath* river navigation, or *Kennett* and *Avon* canal, or any part thereof,) by the owner or owners, consignee or consignees of such goods, wares, or merchandize, or other commodities, the several rates and duties, particularly rated, specified, and set forth in the schedule hereunto annexed, as far as such goods, wares, and merchandizes are therein particularised."

"The *forty-first* section gives power to the directors, with the consent of the justices of the peace for the city of *Bristol*, to be certified by an order of sessions, to lessen any of the said rates and duties chargeable on any articles imported into the said port of *Bristol*; and again to alter and increase them, not exceeding the respective rates by the recited acts made payable."

Annexed to the last mentioned statute, is a schedule intituled, "*Schedules of rates and duties on goods and merchandizes imported into the port of Bris-*

1. By the *Bristol Dock Act*, 48 G. 3, c. xi. sec. 38, certain duties are imposed, "on goods, wares, and merchandize, imported from parts beyond the seas, and not brought by inland navigation into the Port of *Bristol*." Held, that goods imported from *Ireland*, were brought from parts beyond the seas.

2. By another branch of the Statute, other duties are imposed "on goods, wares, and merchandize, brought coastwise into the said port, of foreign growth or importation, but not of British growth or manufacture." Held, that *Irish* linens imported to *Bristol* from *Dublin*, were not brought coastwise.

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tol, imposed by the foregoing act;” which contains, (*inter alia*), the following items:—“Linen *in transitu*, per pack or box, 1s. 6d.: Linen, not *in transitu*, per pack or box, 3s. 6d.”

By stat. 49 G. 3, c. xvii, certain further provisions were made. Each of the acts before-mentioned, contained a clause in the usual form, declaring it to be a public act. In the year 1809, the works directed by the said several acts were completed: From that time until *August*, 1834, no alteration was made in the rate or duty of 3s. 6d. per pack or box of linen not *in transitu*, particularised in the schedule subjoined to the statute 48 G. 3, c. xi, above referred to. By an order dated the 27th of *August*, 1834, the justices in quarter-sessions assembled, declared their consent and approbation that it should be lawful for the directors of the *Bristol Dock Company* to lessen the rates and duties which by the said act of 48 G. 3, were payable on the several articles imported into the said port of *Bristol*, specified and set forth in the schedule under the said order written, to the several sums therein set opposite to the said respective articles; and in that schedule there was the following item:—“Linen, not *in transitu*, per box, 2s. 6d.” Those duties were then lessened by the directors accordingly. The monies borrowed under the before-mentioned acts, together with the capital stock advanced, still remain unpaid and undischarged: and the duties imposed and made payable by the said acts are still vested in, and payable to the said *Bristol Dock Company*. The plaintiff is the treasurer of the *Bristol Dock Company*; who, by the before-mentioned acts, are empowered to sue in the name of their treasurer. The defendant is a natural born subject of the United Kingdom of *Great Britain and Ireland*, born in *Ireland*, who from his birth, except while he was at *Bristol*, as hereinafter mentioned, resided at *Arndale*, in the county of *Armagh*, in *Ireland*, where he carried on the trade of a bleacher of linens. On the 1st of *November*, 1834, he was the owner of 108 pieces of linen, which had been woven in *Ireland*, by *Irish* subjects, out of flax which had been raised and dressed in *Ireland*, by *Irish* subjects: and having packed the same in two wooden boxes, manufactured in *Ireland* by *Irish* subjects, the defendant, on that day, shipped the same from the port of *Dublin* in *Ireland*, in a certain vessel built in *England*, and belonging to and navigated by certain natural born subjects of the United Kingdom, resident in *England*, and called the *Express Steam Packet*, to be carried therein to the port of *Bristol*, being one of the ports of the realm within *England*, consigned and there to be delivered to the said defendant. And the said linens and boxes so being put on board the same vessel were afterwards, on the same day, carried therein by the direct and usual course from the said port of *Dublin*, unto the said port of *Bristol*, whereat they arrived on the 15th of *November* aforesaid, and were there received by the defendant; he the defendant, during all the times aforesaid, knowing that the duty of 2s. 6d. per box on such goods was claimed by the company. The goods so imported, were not *in transitu*. The plaintiff claimed the duty of 2s. 6d. per box for the said linens, under the acts before referred to, which the defendant refused to pay, and referred to and relied on the before-mentioned acts, and particularly the act of 43 G. 3, c. cxi, s. 74, and the schedule of rates and duties thereto annexed; the said act 48 G. 3, c. xi, s. 38, and the schedule of rates and duties thereto annexed, as also on the several statutes of *Ireland*; of *Great Britain*, and of the United Kingdom of *Great Britain and Ireland* generally; and in particular upon the statute of

Ireland, passed in the 40th year the reign of G. 3, c. 38; and the articles 1, 2, 3, 4, 5, 6, 7, and 8, and the 10th section of the said *Irish* act, and the schedule of reciprocal duties thereto annexed: the statute of *Great Britain* 39 & 40 G. 3, c. 67, intituled, "An Act for the Union of *Great Britain* and *Ireland*," and the articles 1, 2, 3, 4, 5, 6, 7, and 8; and the 10th section and the schedule of reciprocal duties thereto annexed.

The question for the opinion of the Court was, whether the rate and duty so demanded and refused, was payable to the *Bristol Dock Company*. If the Court should be of opinion that it was so payable, then judgment was to be entered for the plaintiff by confession, for the sum of five shillings and costs. But if the Court should be of a contrary opinion, then judgment of *nolle prosequi*, with costs, was to be entered for the defendant.

Stephen, Serjt., for the plaintiff.—This question is of general importance, as the Dock Acts of many other ports are similar in their terms, to those which are now brought before the Court. If the question related to the popular meaning of the words "parts beyond the seas," there could be no doubt raised; but the meaning is the same in a technical or legal sense. At the same time they ought to be considered in their popular and extensive sense, as they are merely used in these acts for the purpose of description, and not in reference to any technical principle of law. The older authorities shew that *Ireland* was considered as being beyond seas, *Co. Lit.* 244 a; *Jenk.* c. 10, pl. 18. So on the construction of the Statute of Limitations, *Anonymous* (a); *Barker v. Dormer* (b). And notwithstanding the Act of Union passed since these decisions, the late Stats. 3 & 4 W. 4, c. 42, secs. 4 & 7; and 3 & 4 W. 4, c. 27, s. 19, declared that *Ireland* for the purpose of the Statutes of Limitation, should not be considered as being beyond seas, clearly shewing that otherwise the old rule would have prevailed. By 10th Ann, c. 26, sec. 34, coffee imported into *Great Britain*, and afterwards exported "to parts beyond the seas," was relieved from the payment of duties; and the subsequent Stat. 5 G. 1, c. 11 sec. 5, which makes a fresh provision for the drawback of coffee exported to *Ireland*, clearly shews that, under the former statute, *Ireland* had been considered as being beyond the seas. Again the 13 & 14 Car. 2, c. 11, sec. 3, provides that no captain of any ship "bound for the parts beyond the seas, or unto the kingdom of *Scotland*," shall take any goods on board until he shall have entered the ship at the Custom-House; and the express mention of *Scotland*, shews that *Ireland* was included in the description of parts beyond the seas. By 43 G. 3, c. 128, sec. 1, it is enacted that no goods shall be put on board any vessel "with intent to export the same to parts beyond the seas," until a copy of the entry be delivered to the comptrolling searchers, and such entries are always made when goods are exported to *Ireland*. But the 43 G. 3, c. 68, affords a still stronger proof that *Ireland* is beyond the seas. By sec. 2, of that act, certain duties as specified in schedule A, annexed to the act, are made payable on "goods, wares, or merchandize, imported or brought into *Great Britain* from parts beyond the seas," and the schedule contains a scale of duties payable on corn "on importation from *Ireland*."

As to the Act of Union, that only relates to public rights between the two countries, and the Acts of the Legislature since that period, shew that it has

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not caused any alteration in the law, which has always regarded *Ireland* as being beyond seas. *Jones v. Smart* (c), exemplifies the effect of the Act of Union; there a *diploma* had been granted by one of the *Scotch* Universities, and it was contended that inasmuch as the Act of Union with *Scotland* declares that there shall be a communication of all rights, it must therefore be taken that a *Scotch diploma* conferred the same privileges as an *English diploma*; but Lord *Mansfield*, C. J., says, "It is true that by the fourth article of the act, the *Scotch* have the same general privileges as the *English*, but then they must have the same qualifications, otherwise they come not within the same description; for the general article which declares there shall be a communication of all privileges, can only mean such as are of a general nature."

By 4 G. 4, c. 72, sec. 6, it was declared lawful for the commissioners of his Majesty's Treasury, to declare that the trade between *Great Britain* and *Ireland* should be a coasting trade, which shews that it had not previously been considered as a coasting trade. The subsequent Statutes, 6 Geo. 4, c. 107, sec. 100; and 3 & 4 W. 4, c. 52, sec. 105, contain re-enactments to the same effect.

The *Attorney-General*, (with whom was *W. P. Taunton*,) *contrd.*—The question is, whether the Ports of *Ireland* are not to be put on the same footing as *Liverpool*, *Leeds*, and the other *English* ports. That they should be, is the fair result of the various clauses of the Statutes, obtained for the purpose of forming the docks. The Dock Company was established for purposes of profit, and the plaintiffs are bound to establish their right clearly, before they can levy tolls upon the public. The rule is so laid down by *Bayley*, J., in *Waterhouse v. Keene* (d), which was the case of a Turnpike Act. He says "Acts of Parliament, such as those now in question, must be construed with reference to the particular language in which they are expressed: but where there is any ambiguity in the language used, the construction must be in favour of the public, because it is a general rule, that where the public are to be charged with a burden, the intention of the Legislature to impose that burden, must be explicitly and distinctly shewn." Again in *Denn v. Diamond* (e), the same learned judge says, "It is a well settled rule of law, that every charge upon the subject must be imposed by clear and unambiguous terms." Lord *Tenterden*, C. J., advanced the same doctrine in *Stourbridge Canal Company v. Wheeley* (f), he says, "The Canal having been made under the provisions of an Act of Parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the Statute; and the rule of construction in all such cases, is now fully established to be this,—that any ambiguity in the terms of the contract, must operate against the adventurers, and in favour of the public; and the plaintiffs can claim nothing which is not clearly given to them by the act. This rule is laid down in distinct terms by the Court in the case of *Hull Dock Co. v. La Marche*, 8 B. & C. 51. where some previous authorities are cited; and it was also acted upon in the case of *Leeds and Liverpool Canal Co. v. Hustler*, 1 B. & C. 424. Adopting this rule, we are to decide whether a right to demand some compensation for the

(c) 1 T. R. 44.

(d) 4 B. & Cress. 208.

(e) 4 B. & Cress. 245.

(f) 2 B. & Adol. 793.

use of this part of the canal, is clearly and unambiguously given to the plaintiffs by this Act of Parliament."

It will be important to consider the terms of the Act of Union between *Great Britain and Ireland*, 39 & 40 G. 3, c. 67. By the *third* article it is declared that the *United Kingdom* be represented in one and the same Parliament, to be styled "The Parliament of the *United Kingdom of Great Britain and Ireland*." And by article *six* it is agreed that the subjects of *Great Britain and Ireland* shall be on the same footing in respect of trade and navigation; which shows the anxiety of the legislature that the subjects of the two countries should be put upon precisely the same footing. In all imperial acts since the union, *British* includes *Irish*, and the King is styled *Britanniarum Rex*. By the *first* article of the union, *Great Britain and Ireland* is for ever to be united into one kingdom. How, then, can it be said that *Ireland* is beyond the seas? It can only be said to be beyond seas, in the same sense as the Isle of *Wight* or the Isle of *Anglesey*. Before the Act of Union, *Ireland* was held to be beyond seas within the meaning of the Statute of Limitations and other similar statutes, and the authority of those cases need not be questioned. The Customs' Acts which have been referred to are not entitled to much weight. In framing such acts old precedents are adhered to, *ex abundanti cautela*; and there is an express provision in 43 G. 3, c. 68, sec. 4, that nothing therein contained shall be deemed to alter the Act of Union. In many of the older statutes, the words "beyond the seas," "out of the realm," and "out of this kingdom," are used synonymously. Stats. 32 H. 8, c. 1; 33 H. 8, c. 12 (*Irish*); 10 Car. 1, s. 1, c. 6; 10 Car. 1, sess. 3, c. 21 (*Irish*); 6 Ann c. 10, s. 17 (*Irish*); afford illustrations of this remark. In *King v. Walker* (i), it is said, *arguendo*, that the expression "beyond seas" was first used after the union of the crowns under Jac. 1; before that time, "out of the realm" was the language of the legislature. These Dock Acts are acts of the Imperial Parliament of *Great Britain and Ireland*, and ought to be construed as if the Parliament was held in *Ireland* instead of *Great Britain*.

Since the Act of Union, several Statutes have been passed in which the expression "the United Kingdom" has been used in contradistinction to "beyond seas." Thus, 43 G. 3, c. 56, provides for the passage of emigrants from the United Kingdom to parts beyond seas, and 5 G. 4, c. 84, for the transportation of felons.

In the Statutes 3 & 4 W. 4, c. 52; 3 & 4 W. 4, c. 53; 3 & 4 W. 4, c. 54, and 3 & 4 W. 4, c. 55, (Customs' Acts,) *Ireland* is frequently excluded from the meaning of "beyond seas;" and *British* ships include *Irish* ships as well as *Scotch*. In *Attorney-General v. M'Kenzie* (i), *Irish* spirits imported into *England* since the union, were held to become *British* spirits, and entitled to the same advantages for the purposes of trade and commerce. A legislative exposition of the meaning of the words "beyond seas" is to be found in the Liverpool Dock Act, 51 G. 3, c. 143, (local and personal,) in which *Ireland* is clearly excluded.

Secondly. The plaintiff is not entitled to recover these duties under the second branch of charges, viz., as "goods brought coastwise of *foreign* growth or importation, but not of *British* growth or manufacture." By 6 G. 4, c. 107, sec. 100, the trade between any one part of the United Kingdom to the

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(i) 1 W. Black.

(j) 11 Price, 284.

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other is declared to be a coasting trade; but if these goods are taken to be brought coastwise, they are not of foreign growth or importation, and, therefore, do not come within the terms of this branch of the statute.

Stephen was heard in reply.

Cur. adv. vult.

TINDAL, C. J.—Upon this special case the question is, whether linens, the produce and manufacture of *Ireland*, imported from *Dublin*, in *Ireland*, into the port of *Bristol*, are, or are not, liable to the duty imposed by the *thirty-eighth* section of the *Bristol Dock Act*, 48 G. 3, c. xi? The duty is imposed by that section “on goods, wares, and merchandize imported from parts beyond the seas, and not brought by inland navigation into the port of *Bristol*,” and also “on goods, wares, and merchandize brought coastwise into the said port, of foreign growth or importation, but not of *British* growth or manufacture.” The plaintiff contends, that the goods in question fall within the first branch of the description. The defendant, on the other hand, contends, that they fall under neither of the heads above referred to; not under the first, because *Ireland*, at the time of passing this act, was not, within the meaning of the Statute, “beyond the seas;” not under the second, because, although the goods in question were carried coastwise, (as he, the defendant, contends they were,) they were not of foreign growth or importation, but not of “*British* growth or manufacture,” so as to fill up this second description of goods liable to the duty. With respect to the duty imposed on goods falling within the second description, we cannot bring ourselves to the opinion, that goods imported from any port in *Ireland* into *Bristol* can be considered to be goods brought *coastwise*, within the meaning of the act. The words are incapable of such a construction in their natural and popular sense, and there is no technical meaning annexed to the expression. It is urged in argument, that, by the 6 G. 4, c. 107, s. 100, the legislature has enacted, that all trade from any one part of the United Kingdom to any other part, shall be deemed to be a coasting trade. But that enactment is expressly declared to be made for the purposes of trade and navigation and the revenue of the realm. And we are of opinion, that a legislative enactment, for that purpose cannot have the effect of repealing a duty or toll imposed by a former statute, such duty not being any part of the public revenue of the realm, but granted by the legislature to private individuals for good and valuable service rendered by them to the public. So far, therefore, as the claim to the duty imposed by the Statute 48 G. 3 is concerned, we think the same meaning belongs to the term “*coastwise*,” at the present time, as it had at the time of passing that act. The only question, therefore, which we propose to consider is, whether the goods in question were imported “from parts beyond the seas.” Before we proceed, however, to state the grounds of the opinion at which we have arrived, after the best consideration we have been able to bring to a case of considerable difficulty, it may be useful to observe, that the terms employed by the legislature in imposing the duty, both in the 43 G. 3, c. cxi. s. 75, and also in the 48 G. 3, above referred to, are substantially the same. The two acts differ, indeed, from each other in one very important particular, that whereas, by the former act, goods brought coastwise are exempted from duty; by the latter, goods brought coastwise are made liable to the duty, if of foreign growth or importation. But each of

the acts, in imposing the duty, uses precisely the same expressions, viz., goods imported from parts beyond the seas, goods brought coastwise, and goods brought by inland navigation. So that there can be no doubt that the legislature, in using the words "goods imported from parts beyond the seas into the port of *Bristol*," intended one and the same subject-matter of duty in both the acts. What such meaning and intention of the legislature was, we are called upon to declare. If these words are to be taken in their plain, natural, and popular sense, without reference to any technical meaning acquired by legal use, there could be no difficulty in their interpretation. No one would hesitate to say, that they were intended to express the importing of goods into the port of *Bristol*, in vessels which arrived from any port or place not being in *England* or *Scotland*. For, as the clause which imposes the duty, both in the earlier and later act, specifies and distinguishes the three modes by which, only, goods and merchandizes can be imported into the port of *Bristol* by water; that is to say, by inland navigation, by vessels sailing coastwise, and by vessels from "parts beyond the seas;" the latter expression must be taken to comprehend every mode of importation of goods not included in the former two. And as the coastwise navigation comprehends the navigation from all parts of *England* and *Scotland*, and as the inland navigation comprehends all importation from any part of the interior, the importation "from parts beyond the seas" must comprehend the bringing in of goods by sea from all other places whatsoever, and, consequently the ports of *Ireland* equally with those of *America* and *France*. Such being the natural and ordinary interpretation of the words of the Statute, it is not to be lost sight of during the whole of the inquiry; for, unless there is some technical sense in which the words are used, or unless the construction of other parts of the act does, of necessity, give a different meaning to these words, there is no safer mode of construing a Statute than by interpreting the words employed therein according to their ordinary and familiar signification. The argument, however, on the part of the defendant is, that the phrase "parts beyond the seas" is used by the legislature in these Statutes in the technical sense in which it was well-known by the *English* law; that the acknowledged meaning of that expression was the same as "out of the realm of *England*;" and that, although *Ireland* was, at one time, and for certain purposes, clearly held to be "beyond the seas" in such legal sense, yet that, since the passing of the Act of Union, *Ireland* has become a component part of the same realm with *England*, and, consequently, from that time has ceased to be beyond the seas, as to *England*, within the proper legal meaning of the expression. That *Ireland*, before the Union, was held to be "beyond the seas," with reference to *England*, is certain. It was beyond the seas within the meaning of the exception in the Statute of Limitations, 21 Jac. 1. It was so ruled by *Holt*, C. J., and, as the reporter says, upon consideration.—(*Nightingale v. Adams*, 1 Show. Rep. 91.) It is stated to be beyond seas, for the purpose of presuming non-access to the wife, if the husband be in *Ireland* for a year, and the wife in *England* during that time has issue.—*Jenkin's Cent.* 1, ca. 18; *Co. Litt.* 244 a. So it was held to be beyond the seas, with respect to the exceptions of disabilities under the Statutes relating to fines, and in some other instances. It is also clear, that the expression in the books "beyond the seas" may be taken to be the same, in effect, as "out of the realm of *England*;" for so Lord *Coke* explains the phrase in his *Commen-*

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tary on Littleton, s. 677; *Littleton* there saying, "if the husband goeth beyond sea," and Lord Coke saying, "if he had been *within the realm*, it doth not alter the case." And the expressions "beyond the sea" and "within the land," or "within the realm," appear to be used indiscriminately for each other in the Statutes relating to fines. "See 18 Ed. 1, st. 4; 4 Hen. 7, c. 24, s. 5; in which latter Statute parties are excepted who are described as "out of this land," and who are afterwards, in the same Statute, directed to make their claim within ten years next after their "coming into this realm," and at no time after. To the same effect, also, in 27 Eliz. c. 9, s. 3, the statute makes provision for persons "beyond the seas," so as "such person beyond the seas" shall, within seven years next after the return of such "person within the realm of *England*," or the death of such person, if he shall, before his return, die "in any foreign country, sue his writ of error, &c." It appears, therefore, from these and other authorities which might be cited, that *Ireland* was, at the several periods of time to which they respectively refer, considered to be "in parts beyond the seas," that is, "out of this realm of *England*." It follows, therefore, as an undeniable consequence, that if the act imposing the duty in question had been passed *before* the Act of Union, the laying of the duty on goods imported "from parts beyond the seas" would have attached upon goods imported from *Ireland*; that country being unquestionably, before the Union, "beyond the seas," whether the words are taken in their natural and ordinary sense, or in the legal meaning of the phrase "out of this land," or out of this realm of *England*." But, as the *Bristol Dock Acts* were passed after the Union, the great question in this case arises upon the effect and operation of the Act of Union upon the construction of those words. The defendant argues, that, from the moment the Act of Union was passed, *Ireland* was no longer "beyond the seas" with reference to *England*, but part of one and the same realm, namely, part of the United Kingdom of *Great Britain* and *Ireland*: that whereas, before, *Ireland* was divided from *England* by *St. George's Channel*; now it is no otherwise divided from it than the *Isle of Wight* from the county of *Southampton*; and, consequently, that, when the Statute 48 G. 3, which was passed subsequently to the Act of Union, imposed a duty on all goods imported from parts beyond the seas, it could not comprehend the importation of goods from *Ireland*. There appears to be no provision contained in either of the Statutes 43 G. 3 or 48 G. 3, which throws any certain light on the intention of the legislature with respect to this disputed question. We must, therefore, have recourse to the Act of Union itself, and must further consider different acts of the legislature, relating to this subject-matter, which have passed since the period of the Union, in order to discover, if possible, such indications of the intention of the legislature upon the subject in dispute, as may enable us to come to a safe conclusion thereon.

The part of the Act of Union, 39 & 40 G. 3, c. 67, which has been chiefly relied on by the defendant, is article 6. It is not contended that there is any part of the Act of Union which in terms brings *Ireland* into the realm of *England*, so as to make it literally "part of the same land," or "within the realm," according to the equivalent expression in the older authorities before adverted to; but it is argued, and with great appearance of reason, that by incorporating the two countries into one new united kingdom, the same legal consequences ought to follow which undoubtedly would have

followed if that country had, by the act of legislature, been expressly declared to form part of the realm of *England* alone: and it is insisted more particularly, that the sixth article of the Union, enacting that the subjects of the two countries are placed upon the same footing generally in respect of trade and navigation in all ports and places in the united kingdom and its dependencies, declares in effect, that goods, the produce or manufacture of *Ireland*, shall not be made subject by any future act to a larger duty for entering any port in *England* than similar goods from any port of *Great Britain*.

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We feel the full force of this argument, and if the determination of the question before us had turned upon the construction of the Act of Union alone, we should have thought it extremely difficult to avoid the conclusion above contended for. But several statutes have been referred to by the plaintiff as having passed since the Act of Union, and which are by him insisted upon to be inconsistent with the defendant's inference, that the effect of the union of the two kingdoms was to prevent *Ireland* from continuing "beyond the seas" with reference to *England*. The whole strength of the argument, on the part of the defendant rests, it must be recollected, upon that assumption: and if it should, upon reference to those statutes, appear that since the Act of Union, and notwithstanding its provisions, *Ireland* has been recognized by the legislature as still being "beyond the seas;" with respect to *England*, the inference drawn from the passing of the Act of Union must fall to the ground, and the legislature itself will have afforded an exposition of the sense and meaning which it attached to that phrase, where it occurs in the two statutes now under consideration. And upon reference to those statutes subsequently passed, we think such is the necessary conclusion, and, consequently, that we are bound to adopt such legislative exposition, and to submit our private judgment, in expounding the two statutes, to the same authority by which they were enacted. *First*.—Let us advert to the statute passed in the 3 & 4 W. 4, c. 42. The seventh section enacts, that after the act shall commence, no part of the united kingdom of *Great Britain* and *Ireland* shall be deemed to be beyond the seas within the meaning of the statute 21 Jac. 1. Now if, by the simple operation of the Act of Union, *Ireland* had become, as contended by the defendant, no longer "beyond the seas;" with reference to *England*, such an enactment would seem to have been unnecessary. The making of such enactment, therefore, affords reasonable ground for the inference, that, in the judgment of the legislature, such consequence had not followed. A similar observation arises on the statute 3 & 4 W. 4, c. 27. By section 16 of that act, an exception is made in favour of a person under disability, by reason of his being "absent beyond seas" at the time of the right first accruing; and in section 19, it is further enacted, that no part of the united kingdom of *Great Britain* or *Ireland*, shall be deemed to be "beyond seas," within the meaning of that act. Where was the necessity for this enactment, if *Ireland* had already ceased to be "beyond the seas?" But if these provisions should be argued to be made *pro majori cautela* only, let us next advert to the statute 6 G. 4, c. 107, s. 100. By that statute it is enacted, that no part of the united kingdom, however situated with regard to any other part thereof, shall be deemed in law, with reference to each other, to be "parts beyond the seas" in any matter relating to the trade, or navigation, or revenue of the realm. Upon which statute two observations arise: *first*, that when compared with the sixth article of the Act of Union, it applies distinctly and

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closely to the main object of that article, viz., the equalisation of the king's subjects of *Great Britain* and *Ireland*, in respect of trade and navigation in all ports and places of the united kingdom and its dependencies; and, therefore, the inference arises, that the legislature did not consider that *Ireland* had ceased to be "in parts beyond the seas," from the time of the union; for had such been the consequence, no necessity would there have been to make a subsequent enactment expressly to that effect. The *second* observation is, that although the statute makes every part of *Great Britain* and *Ireland* cease to be beyond the seas with respect to any other part, yet it is only so enacted with respect to the object and purpose declared in the same section, that is, "in any matter relating to the trade or navigation, or revenues of the realm;" and such an enactment for general and public purposes could not operate as a repeal of a duty or toll already granted to a private company by a former act. *Ireland* might therefore cease to be "beyond the seas" for the purposes of the one statute, but continue "beyond the seas" for the purposes of the other. But the statute 43 G. 3, c. 68, is the act by which we feel ourselves most strongly pressed to the conclusion, that the legislature has in effect declared, that at that time *Ireland* was still considered as "beyond the seas" with reference to *England*, and has thereby itself expounded, by a contemporaneous enactment, the meaning of the clause in the two *Bristol Dock Acts*, the 43 G. 3, c. cxl, and the subsequent act of the 48 G. 3, c. xi. By the second section of the act now referred to, certain duties of customs are granted to the king upon goods imported and brought into *Great Britain* "from parts beyond the seas." By section 4, it is enacted, that nothing in the act contained shall extend to repeal or alter any of the provisions contained in the Act of Union. The schedule A, which is annexed to the act, contains the duties of customs payable on the importation into *Great Britain* of certain goods, &c.; and when the article "corn" occurs, two tables are subjoined, of which table one is stated to contain the duties payable on different kinds of corn on importation, *except from Ireland*; and table 2, is stated to contain the duties payable on corn on importation from *Ireland*. Now the duty of custom being granted expressly upon goods imported into *Great Britain* "from parts beyond the seas," the question arises, with respect to the table No. 1.—Why should the importation from *Ireland* be excepted, if *Ireland* was already, by the operation of the Act of Union, no longer "beyond the seas," with reference to *Great Britain*? And again, with respect to table No. 2, the duties of customs having been only granted on goods imported from "beyond the seas," the table of particular duties upon corn imported into *Great Britain* from *Ireland* is equivalent to an express declaration that *Ireland* comes within the general description of places, the importation of goods from whence is liable to the duty imposed by the act. The observation appears the stronger, from the reference that is made to the effect of the Act of Union, which cannot, therefore, be supposed to have been out of the view of the legislature at the time: and further, the act now under consideration is strictly contemporaneous with the first of the *Bristol Dock Acts*; the royal assent having been given to the one in *June*, and to the other in *August* of the very same year.

We cannot but consider these legislative enactments as forming a glossary for the proper interpretation of the expressions in the *Bristol Dock Act*, which are considered to be left in doubt; and that the effect of the several statutes above referred to, is sufficient to destroy the inference upon which the whole

of the defendant's argument rests, viz., that by the Act of Union *Ireland* ceased for all purposes to be considered in parts "beyond the seas." Upon the whole of the question it appears to us, that if the words "parts beyond the seas" are to be taken in their plain and natural sense, as denoting the relative locality of the ports from which goods are sent, and the port of *Bristol* into which they are sent, *Ireland*, in that sense of the words, is manifestly "in parts beyond the seas;" that if the words are to be taken in their legal technical sense, then, undoubtedly, before the union *Ireland* was in parts "beyond the seas;" that, although the Act of Union, if taken separately and alone, might lead to the inference that *Ireland* after the union was no longer to be considered "beyond the seas," yet that the legislature has, by divers acts passed since the Act of Union, at once rebutted such inference, and afforded its own exposition of the sense in which the phrase "parts beyond the seas" was still to be understood with respect to *Ireland*; and feeling ourselves bound to attend to such exposition, we hold the proper interpretation of the statutes relating to the *Bristol Docks* is, that goods imported from *Ireland* into the port of *Bristol* are "goods imported from parts beyond the seas," and, therefore, liable to the duty claimed: and for these reasons we give

Judgment for the plaintiff (a).

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(a) During the present Term, the Court of Exchequer, held in *Lane v. Barnett*, 1 Gale, 368, that *Ireland* is still a place beyond the seas, within 4 Anne, c. 16, sec. 19.

WEST v. ROTHERHAM.

Jun. 29th

THE sheriff had obtained a rule under the Interpleader Act (1 & 2 W. 4, c. 58), and an issue was directed to be tried between the execution creditor and the assignees of a bankrupt, who were the adverse claimants. When the issue came on for trial, it was agreed, without going to trial, that the assignees, who were defendants, should take the proceeds of the execution which had been paid into Court by the sheriff.

On the hearing of a rule obtained by the defendants, for the purpose of getting the money out of Court,

Wilde, Serjt., applied for the sheriff's costs which had been incurred in coming to the Court. He said he was prepared to shew that when such an application was made to a Court of Equity, the sheriff would be entitled to his costs, out of the fund which was in Court.

TINDAL, C. J.—Whenever a case occurs with special circumstances, we may take the matter into our consideration; but the statute gives so great a boon to the sheriff, that, in ordinary cases, we think his costs ought not to be allowed (a).

The sheriff is not entitled to his costs, in ordinary cases, under the Interpleader Act, 1 & 2 W. 4, c. 58.

(a) See *Dabbs v. Humfrey*, ante, 4; *Oram v. Sheldon*, ante, 92.

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Jan. 30th.

BROOK v. BIGGS.

The defendant was tenant to A. of premises of which A. agreed, in writing, to grant a long lease to the plaintiff, subject to certain conditions. The defendant thereupon paid the next quarter's rent to the plaintiff; the agreement was not carried into effect, and A. gave the defendant notice to pay the next quarter's rent to him as before:—*Held*, in an action brought by the plaintiff for the next quarter's use and occupation, that the defendant was not estopped from shewing by these facts, that all parties were remitted to their original rights.

DEBT for use and occupation of certain premises, for a quarter of a year, ending in *October*, 1835. *Plea*—*nil debet*. At the trial, before the Under-Sheriff of *Middlesex*, the following facts were proved:—The defendant entered into possession of the premises as tenant to one *Perring*, under a written agreement, and paid rent to him afterwards in *May*, 1835. *Perring* made an agreement, in writing, with the plaintiff, by which a lease of the premises for fifty-six years was contracted for, upon certain conditions; but it was expressly stipulated that the agreement should not of itself create a lease. The defendant being informed of this transaction, and to avoid a distress which was threatened, paid the plaintiff the quarter's rent due in *Midsummer*, 1835. The agreement between *Perring* and the plaintiff was never carried into effect, in consequence of a dispute between the parties; and *Perring* gave the defendant notice to pay the next quarter's rent, due in *October*, 1835, to him, and the same was paid accordingly. It was contended for the plaintiff, that, under these circumstances, the defendant was estopped from denying the plaintiff's title to the premises; and the Under-Sheriff being of that opinion, a verdict was given for the plaintiff for 11*l.* 5*s.*, the amount of the quarter's rent.

Martin obtained a rule *nisi* to set the verdict aside, and to enter a nonsuit in pursuance of leave reserved, upon the ground that the defendant was not estopped from shewing the true nature of the tenancy. *Rogers v. Pitcher* (a), *Gravenor v. Woodhouse* (b), *Cornish v. Searell* (c), *Shep. Touch. Attornment*, 253.

Talfourd, Serj., shewed cause. It is admitted that the plaintiff had no legal interest in the premises; and the authorities which were cited when the rule was obtained are not questioned. But the relation of landlord and tenant subsisted between the parties; for a quarter's rent was paid to the plaintiff. [*Tindal*, C. J.—The question is, whether the defendant held by the permission and sufferance of the plaintiff, or of some other person.] The defendant had become tenant, from year to year, to the plaintiff; and an equitable interest is sufficient to support an action for use and occupation. *Hull v. Vaughan* (d).

Martin, *contrà* was stopped.

TINDAL, C. J.—This rule must be made absolute. The defendant was tenant to *Perring*, and the plaintiff afterwards entered into an agreement with him for a lease of the premises, which was subject to certain conditions; one of which was, that the agreement should not operate as a lease. The plaintiff had then an equitable interest in the premises, and she was allowed to receive one quarter's rent from the defendant; circumstances subsequently

(a) 6 Taunt. 202.

(b) 1 Bing. 38.

(c) 8 B. & C. 471.

(d) 6 Price, 157.

occurred which put an end to this agreement, and all the parties were then remitted to their original rights, notwithstanding the rent had been paid by the defendant, in the expectation that the agreement would have been carried into effect. I cannot distinguish this from the case we decided yesterday (e), where a person who was tenant to a mortgagor, subsequently received notice from the mortgagee to pay the rent to him; and we held that the tenant was not estopped from shewing that fact.

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PARK, J.—I cannot distinguish this case in principle from that which has been mentioned by my lord.

BOSANQUET, J., and GASELER, J., concurred.

Rule absolute.

(e) *Wagdlow v. Barnett*, ante, 295.

SIMPSON v. CLAYTON.

Jan. 1836.

THIS was an action brought by an under-lessee against the assignee of the lessor, upon a covenant by the lessor and his assigns to use his and their utmost endeavours to procure a renewal of a lease for lives, of certain premises, in *St. George's-fields*. At the trial, before *Park, J.*, it was contended, for the defendant, that he was not required to pay an exorbitant fine for the renewal; and evidence was offered to shew that all due exertions had been used to obtain the renewal of the plaintiff's lease. The learned judge told the jury that the question was, whether the defendant had used his utmost endeavours to obtain the renewal, and that it did not appear to him that he was bound under the covenant to pay an unreasonable and excessive sum to obtain it; his lordship also expressed a strong opinion unfavourable to the plaintiff, as to the effect of evidence which had been given on his behalf, to shew that only a reasonable fine had been required of the defendant. The counsel for the plaintiff thereupon stopped the learned judge before he had concluded his summing up and elected to be nonsuited.

Where the judge at a trial expressed an unfavourable opinion upon evidence offered for the plaintiff, and his counsel therefore stopped the summing up and elected to be nonsuited: *Held*, there being no misdirection, that the plaintiff was not entitled to set aside the nonsuit.

Shee obtained a rule *nisi*, on behalf of the plaintiff, to set aside the nonsuit and for a new trial, upon the authority of *Alexander v. Barker* (a), and *Vacher v. Cocks* (b).

Thesiger and *Platt* shewed cause. This nonsuit cannot be disturbed. *Buller v. Dorant* (c), is an express authority, there *Lawrence, J.*, says, "If there were a misdirection you should have abided the verdict, and have reserved the objection for a motion for a new trial. I believe this has never been done, that a counsel shall lie by until he hears the opinion of the judge at *nisi prius*, and that if he thereupon chooses to be nonsuited, he shall come to the Court to set aside his own act." It is said that this case is overruled by *Alexander v. Barker* (a), and *Vacher v. Cocks* (b); but, in the former case, the nonsuit was directed by the judge, and the opinion which he had expressed at

(a) 2 Cr. & Jer. 133.

(c) 3 Taunt. 229.

(b) 1 B. & Ado. 145.

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nisi prius was incorrect; and in the latter the motion for a new trial was refused, because the Court was of opinion that there had been no misdirection upon one of the points submitted to the jury. Here there was no misdirection by the learned judge, and the plaintiff himself elected to be nonsuited; therefore the cases cited for the plaintiff are strong authorities the other way. In *Ward v. Mason* (f). Mr. Baron *Graham*, lays down the rule as follows:—"I take the distinction to be that where the counsel for the plaintiff asks to be nonsuited, they cannot afterwards move to set it aside; but where the judge orders it, without their concurrence, I think they are not precluded, although they do not object at the time."

Shee, in support of the rule. *Alexander v. Barker* (g) is a decisive authority to shew that notwithstanding the counsel in a cause acquiesce in a nonsuit, out of deference to the judge, the nonsuit may be set aside. So in *Vacker v. Cocks* (h), where the plaintiff's counsel elected to be nonsuited, it was not disputed that the plaintiff was, notwithstanding, entitled to set the nonsuit aside. *Butler v. Dorant* (i) must therefore be considered as overruled; and if the misdirection is made out, then this case cannot be distinguished from those which have been cited for the plaintiff.

TINDAL, C. J.—I am of opinion that this rule must be discharged. The general rule of law is, that if the plaintiff chooses to withdraw a case from the consideration of the jury, and elects to be nonsuited, he cannot afterwards have the nonsuit set aside; but there are exceptions to this general rule, which are founded upon good sense; one of those exceptions is, where the learned judge expresses a strong opinion that the plaintiff ought to be nonsuited, or if the judge refuses or admits evidence improperly, and the counsel for the plaintiff gives his assent, out of deference to the judge, then the Court will ultimately deal out justice between the parties, as if an application was made for a new trial. *Alexander v. Barker* (h) was a case of that kind. There the counsel for the plaintiff acquiesced in a nonsuit which was directed by the judge; and the Court being of opinion, that the course which was followed by the learned judge, at the trial, was incorrect, a new trial was granted. But the present case is not within any of the particulars which have been referred to; for the judge did not direct a nonsuit, nor did he think of doing so; but the plaintiff's counsel, without allowing the case to be submitted to the jury, interposed during the summing up and elected to be nonsuited. I have heard of no misdirection from the learned judge, or that any improper evidence was admitted: but the objection is, that the judge expressed his opinion to the jury as to the weight of the evidence given for the plaintiff; but this he was bound to do, and he only stated an opinion as if he was on the jury, and they were to follow it or not, as they thought fit. The *Attorney-General v. Good* (l) furnishes an authority on this point; there Mr. Baron *Hullock* said, "The only ground remaining is, that too great effect was given to the evidence in the learned judge's direction. I apprehend that that would be a new ground for granting another trial, and would open a door to applications for that purpose, to an extent incalculable. I am at a loss

(f) 9 Price, 294.

(g) 2 Cr. & J. 133.

(h) 1 B. & Ado. 145.

(i) 3 Taunt. 229.

(k) 2 Cr. & J. 133.

(l) M'Leland & Young, 266.

to know by what rule the precise quantum of force which should be attached to a trial is to be measured." I am far from saying that the counsel for the plaintiff acted erroneously in taking the course which they adopted; but they have no right to cast the costs of a double trial upon the defendant.

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BOSANQUET, J.—The counsel for the plaintiff acted wisely or unwisely, and I am far from saying that they did not adopt a prudent course. It does not appear to me that there was any misdirection. It is true that the learned judge may have had an opinion unfavourable to the plaintiff on the effect of his evidence; but the judge did not withdraw it from the jury, but put the question which was in issue, viz., whether the fine demanded was or was not reasonable? I offer no opinion as to the effect of the evidence; but if the judge's opinion was not warranted by the facts, it appears by the *Attorney-General v. Good* (m) that this would not entitle the plaintiff to a new trial.

Rule discharged (n).

(m) M'Leland & Young, 286.

(n) Mr. J. Gaslee was absent, and Mr. J. Park gave no opinion.

END OF HILARY TERM.

A

DIGEST

OF THE

CASES REPORTED IN THIS VOLUME

CONTAINING
THE DECISIONS OF THE COURT OF COMMON PLEAS

FROM
HILARY TERM, 1835, TO HILARY TERM, 1836, INCLUSIVE.

ABANDONMENT.—See INSURANCE, 1, 2, 3.

ACKNOWLEDGMENT.—See FINE.

ACTION.

1. Where the plaintiff and defendant, both claiming to act as clerks to the justices of a division, agreed to leave the dispute to the determination of third parties, who directed that the defendant should act in the office, and divide his fees with the plaintiff:—*Held*, that an action for money had and received might be maintained to recover the moiety of the fees received, and that the defendant could not allege that he was legally entitled to all the fees. *Roland v. Hall*, 111.

2. By a statute it was provided, that no action shall be brought "after six calendar months after the cause of such action should have arisen." A nuisance was caused on the 2d of April, and continued until the 2nd of July, and the jury gave damages at the rate of 10*l.* per month; the action was not commenced until the 30th December:—*Held*, that damages for two days only could be recovered, the action being brought too late to sustain the previous damage. *Wilks v. Hungerford Market Company*, 281.

3. A public thoroughfare was stopped, whereby the plaintiff, a bookseller, whose shop was on the thoroughfare, suffered a loss of custom:—*Held*, sufficient special damage to entitle him to his action on the case. *Id.*

4. Where plaintiff had a right of way in a navigation, which, through his own neglect, was incapable of use from a certain point, and defendant erected an obstruction immediately below that point, *Held*, although the defendant's act caused but a very small prevention of the exercise of the plaintiff's right, that an action on the case could be maintained. *Bower v. Hill*, 45.

ADMINISTRATION.—See ECCLESIASTICAL LAW.

ADMINISTRATOR. See EXECUTOR.

AFFIDAVIT.

See ARREST BAIL, 1, 5. PRACTICE, 37, 39.

1. The jurat of an affidavit sworn before a commissioner for taking affidavits in the Irish courts, residing in *Ireland*, must be verified by proof of his signature. *Skarpe v. Johnston*, 298.

2. In an affidavit of debt by the indorsee against the drawer of a bill of exchange, it is not necessary to state that the acceptor has not paid the bill, or that due notice of dishonour was given to the drawer. *Irving v. Heaton*, 430.

3. The affidavit of debt was for money lent generally, and the indorsement on the *capias* stated the debt to be due on a promissory note:—*Held* not to be a variance. *Patterson v. Habershan*, 316.

AGREEMENT.—See CONTRACT.

ANNUITY.

See BANKRUPT, 9. INFANT, 3.

1. The enrolment of an annuity-deed omitted the word "life" in the heading of one of the columns given by the form in the statute:—*Held*, that this omission did not invalidate the deed. *Flight v. Lord Lake*, 190.

2. An annuity granted by will, no part of which has ever been received by the annuitant, is not within the provisions of 3 & 4 W. 4, c. 27, secs. 2 & 3; and, therefore, notwithstanding those sections, the arrears of the annuity may be recovered by distress, after a lapse of more than twenty years from the death of the testator. *James v. Salter*, 405.

ARBITRATION.

See ATTACHMENT, 1. COSTS, 8.

1. Where, by order of *nisi prius*, a verdict was taken for the plaintiff, subject to an arbitration, which was not entered upon, through the default of a third party, the plaintiff may apply for leave to enter and try the cause *de novo*. *Bacon v. Cresswell*, 189.

2. In an action for board found the defendant's wife, and non-assumpsit pleaded, a legal arbitrator received evidence that the wife had been guilty of adultery, and made an award for the defendant. Upon an application to set aside the award, upon the ground that the defence ought to have been specially pleaded, the Court refused to interfere. *Symes v. Goodfellow*, 400.

3. Where an arbitrator directed that one party to the submission might bring actions in the name of the other, *Held*, that the award was not therefore bad. *Burt v. Wigley*, 81.

4. An award will not be set aside, although the affidavits in support of the application disclose strong imputations upon the testimony of a material witness who was examined before the arbitrator; nor is the arbitrator bound to examine a party in the cause who could have contradicted the witness. *Scales v. East London Water Works Co.*, 91.

5. By an order of reference, an action and all matters in difference were referred to arbitration, the costs of the suit and of the reference to abide the event of the award. The arbitrator directed the defendant to deliver certain goods to the plaintiff, and the plaintiff to pay a sum of money to the defendant, that all proceedings in the action should cease, and a general release be given:—*Held*, that the award was not uncertain as to costs, as the effect of it was that each party should pay his own. *Yates v. Knight*, 368.

ARREST.

See AFFIDAVIT, 2, 3. BAIL, 1, 3. SHERIFF.

Where the affidavit to hold to bail discloses that the debt is *primæ facie* barred by the Statute of Limitations, and where other peculiar facts are stated on affidavit, to show that the plaintiff has no cause of action, the Court will grant a rule *nisi*, calling upon the plaintiff to show cause why the defendant should not be discharged out of custody on entering a common appearance. *Tucker v. Tucker*, 15.

ASSIGNMENT.—See INSOLVENT, 2, 3, 4, 5.

ATTACHMENT.

1. An award directed that a bond should be delivered up to the plaintiffs upon demand:—

Held, that a demand made by one plaintiff, without a power of attorney from the others, was an insufficient demand to obtain an attachment. *Sykes v. Hague*, 197.

2. The defendant's niece, who resided with him, was a material witness for the plaintiff, and it appearing to the Court that the defendant had refused to allow a subpoena to be served upon her, an attachment was granted against the defendant. *Clement v. Williams*, 382.

3. A rule of court made certain costs in a cause payable to the defendants or their attorney. The name of the London agent to the country attorney was upon the record as defendant's attorney; the demand of the money was made by the country attorney:—*Held*, to be sufficient to ground an attachment, as he was substantially the attorney in the cause. *Dennett v. Pass*, 157.

4. The service of an *allocatur* for the payment of costs must be personal, before an attachment will be granted. *Dicas v. Warne*, 91.

ATTORNEY.

See ATTACHMENT, 3. COSTS, 7, 8. PRACTICE, 3, 37, 39, 40. PLEADING, 9.

1. The attorney's right to lien under R. H. T. 2 W. 4, No. 93, extends to costs taxed as between attorney and client. *Watson v. Mackall*, 73.

2. An attorney will be re-admitted although upon two occasions he has acted as an attorney whilst uncertificated. *Ex parte Loverton*, 77.

3. Where a vendor's attorney disclosed outstanding terms upon an abstract, although a marketable title might have been shown by taking it up at a subsequent date:—*Held*, that, upon taxation of the attorney's costs, he was entitled to be paid his charges incurred in getting in the outstanding terms. *Ex parte Quicke*, 202.

4. But the attorney will not be allowed his charges for attested copies of a will, which, by the conditions of sale, were to be given at the vendor's expense, such a condition being unusual. *Id.*

5. Charges for searching the Warrant of Attorney Office, and for a fee paid there, do not make an attorney's bill taxable under stat. 2 G. 2, c. 23. *Ex parte Bowles*, 143.

6. The Court has no common law jurisdiction to order an attorney's bill to be taxed. *Id.*

7. After an action has been commenced against an attorney for practising without being duly enrolled, the Court will not allow the enrolment to be entered *nunc pro tunc*. *Ex parte Swift*, 175.

BAIL.

See PRACTICE, 28.

1. If a defendant pays money into court in lieu of bail above, in pursuance of stat. 7 & 8 G.

4, c. 71, he cannot afterwards object that the affidavit by which he was held to bail is defective. *Green v. Glasbrook*, 27.

2. In *sci. fa.* against bail, irregularities in the issuing of the *ca. sa.* against the principal may be taken advantage of upon motion as well as by pleading. *Golding v. Laporte*, 431.

3. Where a defendant is arrested, either in town or country, under a writ of *capias*, he has only eight days to put in and perfect special bail, the R. H. T. 2 W. 4, No. 14, being abrogated by the Uniformity of Process Act, 2 W. 4, c. 39. *Grant v. Gibbs*, 56.

4. In justifying bail where the qualifying property consisted of money deposited in the hands of bail to indemnify him, the qualification was held insufficient. *Nicholls's Bail*, 77.

5. In justifying bail, the form of affidavit given in R. T. 1 W. 4, need not be strictly followed, and where only one kind of property is described, the value sufficiently appears in the previous part of the affidavit. *Boyd's Bail*, 93.

6. Where it was sworn that bail justifying by affidavit was an infant, time will be given the other party to answer without payment of costs. *Higgins's Bail*, 94.

7. It is too late, after bail are sworn, to object that the costs of a former opposition have not been deposited with the officer of the Court. *Knight's Bail*, 370.

BANKRUPT.

See EVIDENCE, 5. PLEADING, 6. 28. PRACTICE, 19. 34.

1. The assignees of a bankrupt brought an action against defendant, without alleging special damage, for not accepting a bill of exchange, in pursuance of an agreement made on balancing accounts with the bankrupt, to which defendant pleaded a set off for money lent and money received to his use:—*Held*, that the transaction was “a mutual credit” within sec. 50 of 6 G. 4, c. 16, and that the plea of set-off could be maintained. *Gibson v. Bell*, 136.

2. One *Scrivener* was indebted to the defendant, an attorney, who had a lien on an indenture of lease relating to premises belonging to *Scrivener*, as a security for his debt. A commission in bankruptcy issued against *Scrivener*, and an assignee was appointed; the defendant acted as solicitor to the commission: a petition was presented to supersede the commission, on the ground that there was no valid petitioning creditor's debt, and the defendant, with notice of that fact, joined the assignee in an assignment of the said lease to a purchaser, and out of the purchase-money the assignee paid defendant the debt due from the bankrupt, and also a part of the amount of his bill as solicitor to the commission; the defendant also received, by the authority of the assignees, certain sums of money ac-

cruing from the rents of the premises, in part liquidation of the debts due to him. After these facts occurred, the commission was superseded, and the plaintiffs were appointed assignees under a new fiat which was issued:—*Held*, that the plaintiffs could recover the sums received by the defendant in an action for money had and received; for, by parting with the lease, the defendant was guilty of a conversion, and the plaintiffs were therefore entitled to waive the tort and sue in assumpsit; and that as to the rent received by the defendant, it was money received to the use of the plaintiffs after notice of an act of bankruptcy; and as the first assignee was not assignee *de jure*, his assent to the payments made no difference. *Clark v. Gilbert*, 347.

3. The sheriff seized goods belonging to a bankrupt, and after keeping them for a considerable period, and after an action of trover in the usual form had been brought against him by the assignees, he delivered up the goods to them:—*Held*, that the assignees were not entitled to proceed in the action, and to recover as damages a quarter's rent, which they had paid for the house where the goods were kept, whilst in the possession of the sheriff, or the costs of keeping their messenger on the premises during the same period. *Moon v. Raphael*, 289.

4. Where a bankrupt, in contemplation of bankruptcy, pays money to A., his banker, to redeem bills of exchange in his hands, for the payment of which B. is ultimately responsible, with a view to make a fraudulent preference of B., the assignees cannot recover back the amount from A. *Abbott v. Pomfret*, 24.

5. In an action by assignees to recover money paid by a bankrupt, by way of fraudulent preference, the proper question for the jury is, whether it was paid in contemplation of bankruptcy; a contemplation of insolvency is not sufficient. *Atkinson v. Brindle*, 336.

6. A. and B., joint traders, entered into a deed of composition with their joint creditors, whereby it was agreed that the traders should remain in possession of the joint stock in trade, and that the creditors should receive 4s. 6d. in the pound, payable by instalments; and the separate property of A., consisting of a policy of insurance on his life, was assigned to trustees as a security for the payment of the instalments:—*Held*, that this was not an act of bankruptcy to support a fiat against A., and that it was properly left to the jury to say whether the deed was executed by A. in contemplation of bankruptcy with intent to defraud his separate creditors. *Abbott v. Burbage*, 448.

7. A., in consideration of money advanced and to be advanced by B. & Co., assigned all the freight to arise from the ship N. under any existing or future charter-party or other contract, “for or in respect of her then intended voyage to India and back to England.” After the freight had been earned and ascertained, A. became bankrupt:—*Held*, that such assignment was good;

and that the assignees of the bankrupt were not entitled to sue for the freight. And notice of the assignment to the defendant being averred, *Held*, that the freight did not remain in the reputed ownership of the bankrupt within the cases decided on 21 Jac. 1, c. 19, ss. 10 & 11. *Leisle v. Guthrie*, 83.

8. The plaintiff having been made a bankrupt, applied to a commissioner in bankruptcy to have an official assignee appointed, in order that his estate might not be wasted, and also to enable him to contest the validity of the commission. The defendant was accordingly appointed official assignee, but he had no knowledge of the plaintiff's application. It proved that the petitioning creditor's debt was invalid, and it was held, that the plaintiff was not estopped from suing the defendant for money received by him in his character of official assignee, and that no previous demand of the money need be made. *Munk v. Clarke*, 310.

9. The defendant covenanted, as surety for one *Smallwood*, for the due payment of an annuity, and that *Smallwood* should complete the building of certain houses to secure the annuity:—*Held*, that a claim for arrears of the annuity which became due after the bankruptcy of the defendant, was not barred by his certificate. Secondly, that a breach assigned that the houses were not finished by *Smallwood*, was a claim for general and unliquidated damages not provable under the bankruptcy of the surety, and was not therefore barred by his certificate. *Thompson v. Thompson*, 225.

BILLS OF EXCHANGE.

See AFFIDAVIT, 2, 3. EVIDENCE, 8, 11. FOREIGN LAWS, 1. FRAUDS, STATUTE OF, 1. PLEADING, 19, 20, 24, 29. PRACTICE, 33. TROVER, 2. VARIANCE, 3.

1. The defendant gave a blank acceptance on a bill-stamp, and a person who was quite unknown to the acceptor afterwards wrote his name as drawer and indorser of the bill, and it was subsequently filled up as a bill of exchange for 500*l.*:—*Held*, that it does not lie in the mouth of the acceptor to say that such drawing and indorsing of the bill was irregular. *Schultz v. Astley*, 425.

2. Where a bill with a blank acceptance was drawn and indorsed by one *Richardson*, in the fictitious name of *Wilson*:—*Held*, in the absence of evidence that the drawer passed himself off for a different person of the name of *Wilson*, or of any intention to defraud any other person, that it was not a forgery, and that the bill was not void on that account. *Id.*

3. The defendant, the indorsee of a promissory note which was not negotiable, indorsed it to the plaintiff in payment for goods; the plaintiff neglected to present the note to the maker when it became due, and it remained unpaid:—*Held*, that the plaintiff could, notwithstanding, recover

the price of the goods sold from the defendant, as the note not being originally negotiable, the plaintiff had not been guilty of laches in not presenting it, and the transfer not amounting to a new making, for want of a stamp. *Plimley v. Westley*, 324.

4. The holder of a bill received due notice of dishonour, and he wrote a letter the same day to the indorser, stating the fact, but the letter was not received until the following day:—*Held* a sufficient notice to the indorser. *Poole v. Dicus*, 162.

5. In an action on a promissory note payable on demand, the jury cannot give interest except from the time a demand of payment is made. The issuing of a writ of summons is a sufficient demand. *Pierce v. Fothergill*, 251.

BOND.—See REPLEVIN.

BRISTOL.—See IRELAND.

CARRIER.

By 11 Geo. 4, and 1 Wm. 4, c. 68, sec. 8, carriers are responsible for losses arising from the felonious acts of their servants. The defendant, a carrier, was sued to recover the value of a parcel lost, and slight evidence was given to raise a suspicion that his servant, who was still in his employ, had stolen the parcel: on a verdict found for the plaintiff a new trial was refused, on the ground that the defendant ought to have called the servant as a witness. *Boyce v. Chapman*, 338.

CHURCHWARDEN.—See SLANDER, 1, 2.

CONDITION.—See DEVISE, 7. CONTRACT, 2.

CONTRACT.

1. The plaintiff in *London*, and the defendant in *Hamburg*, were correspondents of *Joppert* and Co. of *Rio de Janeiro*. *Joppert* and Co. informed the plaintiffs that they had requested the defendant to pay the proceeds of certain coffee to them after a sale had been realized. The plaintiffs thereupon wrote to the defendant and requested to know the particulars of the remittances from *Joppert* and Co., to which the defendant returned the following reply:—"We are directed by *Joppert* and Co. to remit to you the proceeds of 110 bags real ordinary coffee, which they consigned to us, but which are not yet disposed of."—*Held*, that this amounted to an undertaking on the part of the defendant to hold the proceeds of the coffee for the use of the plaintiffs, and that the defendant could not after-

wards claim to set off the amount of the sale of the coffee against a balance due to himself from *Jeppert and Co*, and that assumpsit for money had and received was the proper form of action. *Frühling v. Schröder*, 105.

2. The plaintiffs in *London* entered into the following contract with the defendants:—"Oct. 11, 1833. Sold to *Gardner and Son*, for account of Messrs. A. and Co., 200 firkins of *Murphy and Co.'s Sligo butter* at 71s. 6d. per cwt. free on board. Payment, bill at two months from the date of landing. To be shipped this month," &c.—The butters were not shipped until the following month, but the jury found that the defendants had waived that condition, and they accepted the invoice and the bill of lading, which was indorsed to them. The butters were afterwards lost on the voyage:—*Held*, that an action for goods bargained and sold was maintainable to recover the price of the butters. *Alexander v. Gardner*, 147.

3. Where the plaintiff sold timber felled on land, occupied by A., to B. at per cube foot, and the length and girth of the timber was taken, but the total cubic contents of all the trees were not calculated, and A. fetched away part of the trees and marked the remainder:—*Held*, First, That the delivery was complete, and that nothing remained to be done on the part of the vendor. Secondly, That the timber being on the land of A., the vendor had no right of lien upon that which remained for the price of the whole. *Tansley v. Turner*, 267.

COPYHOLD.—See DEVISE, 4. INSOLVENT, 5.

COSTS.

See ARBITRATION, 5. ATTACHMENT, 3, 4. ATTORNEY 1, 3, 4, 5, 6. INTERPLEADER, 2, 6, 7, 8. PLEADING, 9. VENDOR AND VENDEE, 1, 2, 3, 4.

1. In assumpsit against an executor he pleaded a retainer and *plene administravit prater*, and the plaintiff, admitting the truth of the pleas, took judgments of assets *quando acciderint*:—*Held*, that he was entitled to enter it up for the debt and costs. *Cor v. Peacock*, 272.

2. In an action for a malicious distress, the plaintiff cannot recover his extra costs as between attorney and client, incurred in an action of replevin which the plaintiff had brought to recover the goods distrained. *Grace v. Morgan*, 398.

3. Where, in an action of trespass, a verdict is found against one defendant, but in favour of another, the costs may be set off, notwithstanding the effect of it would be to deprive the attorney of his lien. Reg. H. T. 2 W. 4, No. 93, does not apply to such a case. *George v. Elston*, 63.

4. To entitle a plaintiff executor, to be relieved from payment of costs to a defendant who has succeeded in an action, under Stat.

3 & 4 Wm. 4, c. 42, sec. 31, it is not sufficient to prove that the action was brought *bona fide*, and with a fair chance of succeeding, but some misconduct on the part of the defendant, or some other special cause for exemption, must be shown. *Vaughan, J., dissentiente. Southgate v. Crowley*, 1.

5. Where the defendant was arrested for 65*l.* and the plaintiff recovered only 44*l.*, *Held*, that under the circumstances proved at the trial, the defendant was entitled to have his costs taxed under 43 Geo. 3, c. 46, s. 3. *Bradley v. Milnes*, 118.

6. A plaintiff in replevin is not entitled to security for costs although the defendant is in insolvent circumstances. *Heskett v. Biddle*, 119.

7. Charges for searching the Warrant of Attorney Office, and for a fee paid there, do not make an attorney's bill taxable under Stat. 2, Geo. 2, c. 28, and the Court has no common law jurisdiction to order an attorney's bill to be taxed. *Esparte Bowles*, 143.

8. Where a cause is referred to arbitration before issue joined, the Reg. H. T. 2 W. 4, No. 74, must be observed on the taxation of the costs. *Daubus v. Rickman*, 75.

9. An administrator arrested the defendant on a bond given to the intestate more than 20 years before his death, and no interest had been paid upon it. The defendant pleaded his discharge under the Insolvent Act, and the verdict was found in his favour. It appeared that the plaintiff had knowledge that the defendant had applied for his discharge before the action was brought:—*Held*, that the administrator was not entitled to be relieved from the payment of costs to the defendant under 3 & 4 Wm. 4, c. 42, sec. 31. *Engler v. Twysden*, 303.

10. Where one of two lessors of the plaintiff is abroad, the defendant is not entitled to security for his costs. *Doe d. Bowden v. Roe*, 315.

11. Where a commission issued at the instance of the defendant, for the examination of a witness who was abroad, under Stat. 1 Wm. 4, c. 22, sec. 3, and the defendant obtained a verdict:—*Held*, that he is not entitled to the costs of the commission. *Brydges v. Fisher*, 36.

12. Where a plaintiff is a mariner and is abroad on a voyage, his family being left in this country in lodgings:—*Held*, that he will not be required to give security for costs. *Ford v. Boucher*, 58.

13. If one of three plaintiffs is resident in this country, and the other two are residing abroad, the defendant is not entitled to security for his costs. *Orr v. Bowles*, 23.

14. A judge has no power under Stat. 3 & 4 W. 4, c. 42, sec. 32, to certify to deprive a police-officer of his costs who is a defendant in an action and obtains a verdict; as that statute does not repeal s. 41, of the Police Act, 10 G. 4, c. 44, which gives police-officers their costs absolutely. *Humphrey v. Woodhouse*, 64.

COVENANT.

See INFANT, 3.

1. One *Littlehales* made a lease of copyhold premises in 1762, subject to certain covenants, to be performed by the lessee and his assigns, *Littlehales* having, at that time, only an equitable interest in the premises. In 1775 he obtained the legal estate, and the question was, whether the assignee of the reversion could maintain an action against the assignee of the lessee, for breach of the covenants in the lease of 1762:—*Held*, that the action was not maintainable. *Whitton v. Peacock*, 376.

2. After the lessor had obtained the legal estate, he granted another lease, in which the former lease of 1762 was recited, but it was agreed that it should continue in force, and the same rent remain reserved:—*Held*, that the assignee of the reversion could not sue for breach of the covenants contained in the lease of 1762. *Ib.*

3. The lessees of a theatre by deed under seal, agreed to repay certain money lent to them by the plaintiff, on a day certain, and that until payment, the plaintiff, and such persons as he might appoint, should have the free use of two boxes in the theatre, one in the dress circle and one in the circle above, no specific boxes being mentioned. The lessees afterwards assigned their interest in the theatre to the defendant:—*Held*, that this was a mere personal contract, and that no action could be maintained against the assignee for refusing to permit the plaintiff to use the boxes in the theatre. *Flight v. Glossop*, 263.

CROWN LANDS.—See EJECTMENT, 7.

DAMAGES.—See ACTION, 2, 3, 4. BANKRUPT, 3. BILL OF EXCHANGE, 5.

DEVASTAVIT.—See EXECUTOR, 1.

DEED.—See BANKRUPT, 6, 9. COVENANT, 1, 2. PLEADING, 16. TITHES.

DEVISE.

See LEGACY, 1.—TRUSTEES, 2.

1. Devise of freehold estates to *T. Pearce*, the testator's cousin, for the term of his life, with a power to lease for seven years, and subject to the said estate for life, the testator devised the same to such of his, the testator's relations of the name of *Pearce*, being a male, as the said *T. Pearce* should appoint or adopt, and in default of such appointment or adoption, then

"unto the next and nearest relation or nearest of kin of the testator of the name of *Pearce*, being a male, who should be living at the testator's decease, his heirs and assigns for ever;" the said *T. Pearce*, who was the nearest relation of the testator of the name of *Pearce*, died without making any appointment or adoption in pursuance of the directions contained in the will:—*Held*, that *T. Pearce* took an estate in fee under the ultimate limitation. *Pearce v. Vincent*, 358.

2. Testator devised certain leasehold premises to his daughter for life, and from and immediately after her decease to her two eldest sons for their lives as tenants in common, and in case she should not have a son or sons to attain 21, and such sons dying without issue, then to all and every the daughters of his said daughter, their executors, administrators, and assigns, and if only one daughter, then wholly to that one, and to her legal representatives, with remainders over in case his daughter should die without issue: and he gave all the rest, residue, and remainder of his estate to his daughter:—*Held*, that the daughter took an express estate for life, with a remainder to her two eldest sons for their lives as tenants in common, with the ultimate remainder, on certain contingencies, to herself. *Bradshaw v. Skilbeck*, 240.

3. Devise to A. B., and C., and their lawful issue respectively, in tail general, with benefit of survivorship among the issue respectively as tenants in common:—*Held*, that A., B., and C. took life estates, and their children contingent remainders in tail general, by purchase in their respective parents' shares, with cross remainders in tail among A., B., and C.: the testator having used the word "issue" as synonymous with "sons" or "daughters." *Cursham v. Newland*, 272.

4. Devise of freehold, copyhold, and leasehold estates, and all other the testator's real and personal estates unto N., H., and H., their heirs, executors, administrators, and assigns, and to the heirs, executors, administrators, and assigns of the survivor, upon trust to pay and apply, or permit and suffer M. to take the rents and profits for her absolute use for life, and after her decease, upon trust for A., B., and C., and their lawful issue respectively, in tail general, with benefit of survivorship to and amongst their issue respectively as tenants in common, such issue not to have a vested interest till twenty-one, and the said trustees, after the death of A., B., and C., or either of them, to apply the whole or any part of the rents and profits of the trust estates, not exceeding the presumptive share of each child, towards his or her maintenance during minority:—*Held*, that the trustees took an estate in fee in the freehold and copyholds, and an absolute interest in the leaseholds. *Cursham v. Newland*, 278.

5. A testator gave, devised, and bequeathed unto A., "all my freehold and leasehold, and all

my money, securities for money, stock in government funds, goods, chattels, and all other my property whatsoever and wheresoever, to hold the same unto and for the use of A., her heirs, executors, administrators, and assigns for ever:"—*Held*, that the testator's copyhold estates passed to the devisee. *Edwards v. Barnes*, 293.

6. A testator devised his freehold estates to trustees upon trust, as to three undivided fourth parts, "to pay to or permit and suffer" his wife and daughters to receive "the clear yearly rents and profits," and as to the other undivided fourth part, "to pay to or permit and suffer" his son to receive "the clear yearly rents and profits." He further directed that the shares of his wife and daughters should be for their sole and separate use; and that the trustees should let the estates upon certain conditions, and out of the rents should pay all taxes, and for repairs:—*Held*, that the legal estate in the whole of the premises vested in the trustees. *White v. Parker*, 112.

7. *Thomas James Selby* devised estates in fee, in the following words:—"To my right and lawful heir at law, for the better finding out of whom I direct advertisements to be published immediately after my decease in some of the public papers," and then he added, "that if no heir at law was found, he constituted *William Lowndes* his lawful heir, on condition that he changed his name to *Selby*." The testator knew that he had cousins alive *ex parte materná*, and the estates were chargeable with the payment of legacies within twelve months after his decease:—*Held*, that the testator intended to designate an heir of the blood of the *Selbys*, and not an heir *ex parte materná*; and *semble*, that the condition as to taking the name of *Selby*, was satisfied by using it in conjunction with that of *Lowndes*, and that it was unnecessary to obtain a sign manual from the king. *Davies v. Lowndes*, 125.

8. A testator devised lands to his wife and trustees, in fee, in trust for his wife for life, and after her decease for the use of his three children for their lives, in equal shares, and to the issue of their bodies for their respective life only, in equal shares, for ever; and in case of the death of either of the three children, without issue, then, upon trust, for the survivors or survivor, in equal shares, for life only, or to their respective lawful issues, in equal shares, for life only; and in case there should be only one child then living, in trust, for such only child for life only, and the issue of such only child for life, in equal shares; and if but one issue of such child, to such issue for life only, and the heir of his or her body, for ever, and in case there should be no issue of such child, then remainders over; and it was declared that either child who should marry should have a power to make a settlement of his share for the lives of the parties, and the lives of their issue, with remainders

over in tail. By a codicil which recited the above devise, the testator, after the decease of his wife, devised the same lands to the trustees, in fee, in trust, for his three children, as tenants in common, for the term of ninety-nine years from his decease, if they or either of them should so long live; and after the determination of, and subject to, that term, to the trustees, in fee, to preserve contingent remainders; and the uses expressed in the will were to be carried into perfect execution:—*Held*, that the three children of the testator took estates for the term of ninety-nine years, if they should so long live, as tenants in common, with remainder to the trustees and their heirs, during the respective lives of the said three children, in trust, to preserve contingent remainders, with remainder to the said three children, as tenants in common in tail general, with cross remainders between them in tail general. *Brooks v. Turner*, 440.

DISTRESS.

1. Under 11 Geo. 2, c. 19, sec. 1, a landlord cannot distress goods removed by the tenant before the rent becomes due, even where they are clandestinely removed a day before the rent becomes due. *Rand v. Vaughan*, 173.

2. The Stat. 13 Edw. 1, c. 37, (West. 2.) which enacts that no distress shall be taken except by bailiffs "sworn and known," does not apply to distresses taken for rent in arrear. *Begbie v. Hayne*, 266.

EASEMENT.

See ACTION, 3, 4. PLEADING, 5. VARIANCE, 2.

ECCLESIASTICAL LAW.

1. Where they are *boná notabilia* in a peculiar, and also in other parts of the diocese of the archbishop, a prerogative administration is not absolutely void, and will therefore be considered valid at law, until it be set aside by proceedings in the Ecclesiastical Court. *Lysons v. Barrow*, 390.

2. Whether in such a case a metropolitan administration is voidable, *quere*. *Id*.

EJECTMENT.

See COSTS, 10. EVIDENCE, 3, 4, 6.

1. Where judgment and execution in ejectment was regularly obtained without collusion with the tenants in possession, the Court refused to set it aside, at the instance of a party who stated that he was landlord of the premises, and had not received any notice of the declaration in ejectment. *Doc d. Martin v. Roe*, 223.

2. An estate was contracted to be sold, and the vendee paid part of the purchase-money, and entered into possession without a conveyance, paying interest on the remainder of the purchase-money from time to time:—*Held*, that his possession was not adverse, and that, after twenty years, an ejectment might be brought. *Doc d. Milburn v. Edgar*, 437.

3. An inclosure act directed that a vendee let into possession of any of the allotments, should have the same rights as the vendor:—*Held*, that this was only applicable to the relative rights of the vendor and vendee. *Id.*

4. Service of a declaration in ejectment on the wife of the tenant, at her husband's residence, is sufficient, although the husband does not reside on the premises sought to be recovered. *Doc d. Lord Southampton v. Roe*, 24.

5. Where proceedings are taken under stat. 4 Geo. 2, c. 28, affixing the declaration in ejectment upon the door of the demised premises, will not be allowed as good service, if there is any probability that the tenant can be personally served. *Doc d. Pugh v. Roe*, 6.

6. Service of a declaration in ejectment on the wife of the son of the tenant on the premises, *held* sufficient to grant a rule nisi for judgment against the casual ejector, where it appeared that the tenant was in *America*, and that his son managed his business. *Doc d. Potter v. Roe*, 316.

7. An enclosure of waste lands had been made on a manor belonging to the crown, which was held for twenty-three years without payment of rent, or other acknowledgment. The manor was sold in fee by certain commissioners, by virtue of 57 Geo. 3, c. 97, to the lessor of the plaintiff, who brought an ejectment to recover the enclosure:—*Held*, that although the crown might have ousted the party in possession of the enclosure, the lessor of the plaintiff was not entitled to bring an ejectment. The commissioners have no power under 57 Geo. 3, c. 97, to sell to a subject the right to recover property to which the crown had only a right of possession. *Doc d. Watt v. Morris*, 215.

EVIDENCE.

See ATTACHMENT, 2. BILL OF EXCHANGE, 4.
COSTS, 11. VARIANCE, 1, 2, 3, 4, 5, 6, 7, 8.

1. In an action for libel, it was proved that in *September* the defendant sent a letter to the plaintiff, containing several passages of a libellous letter published in the following *November* in a newspaper:—*Held*, that in an action for the publication in the newspaper, the portions which corresponded might be read in evidence to show the *animus* of the defendant. *Tarpley v. Blabey*, 414.

2. In order to admit evidence of the publication of libels by the plaintiff against the defendant, it must be shown that they were the im-

mediate provocation which led to the publication of the libel which is the subject of the action. *Id.*

3. Upon a question whether waste land on the side of a road belonged to the owner of the adjoining enclosure, or to the lord of the manor, grants made by the lord of the waste lands lying on both sides of the road at a considerable distance from the spot in dispute, but in continuity with it, are admissible in evidence; acts of ownership having been proved to have been exercised by the lord on the waste in the immediate vicinity of the wastes adjoining to the plaintiff's enclosure. *Doc d. Barrett v. Kemp*, 231.

4. But grants made by the lord, of waste lands in other parts of the manor, which were not in continuity with the spot in dispute, are not admissible in evidence. *Id.*

5. A trader in embarrassed circumstances wrote letters in *January* to the holders of bills due the following month, praying for further accommodation. To prove an act of bankruptcy, several weeks after writing the letters, evidence was given that the bankrupt left his home under circumstances of suspicion:—*Held*, that for the purpose of showing the motives for his absence, the letters were admissible. *Smith v. Cramer*, 124.

6. For the purpose of showing the right under which a tenant held lands, certain decrees in Chancery touching the title to the same lands, made in a cause in which other parties were claimants, were held admissible in evidence. *Davies v. Lovendes*, 125.

7. In an action for slander, a writ of inquiry issued in a former suit against the defendant for speaking similar slanderous words, may be received in evidence to prove malice. *Jackson v. Adams*, 78.

8. Where the drawer of an accommodation bill misapplied the bill, and the acceptor brought trover to recover it from a third party, to whom the drawer had improperly paid it away:—*Held*, that the drawer was a competent witness to support the plaintiff's case. *Fancourt v. Bull*, 98.

9. What is a sufficient search for witnesses to prove handwriting to allow secondary evidence to be given, must depend on the circumstances of each case, and *vide* what search was held sufficient. *Miller v. Miller*, 187.

10. A witness may be ordered to be examined upon interrogatories under 1 Wm. 4, c. 22, upon the trial of an issue directed by the Court of Chancery. *Bourdieu v. Rowe*, 93.

11. A clerk in the notary's office went out in the evening to present bills, and returned the same evening and entered in a book the answers he had received from each person, and this was the usual practice of the office:—*Held*, that after the death of the clerk, the entry was admissible to prove the dishonour of a bill. *Poole v. Dicus*, 162.

12. A sheriff's officer proved that he had seized goods under a warrant on a *fi. fa.*, which was brought to him by his man, who told him that he had obtained it from the sheriff's office. The officer also stated, that he knew the handwriting on the warrant, which he had subsequently lost:—*Held*, that this was sufficient evidence to prove that the officer acted under the authority of the sheriff. *Moon v. Raphael*, 289.

13. Where the plaintiff stated in his declaration that he was possessed of a certain lease of certain premises for a certain term of years, which he put up for sale, and which the defendant purchased; in an action for not completing the purchase, the plaintiff in proving his title must prove the execution of the original lease as well as of the meane assignment to himself. *Laythorpe v. Bryant*, 19.

14. If the assignee of a term brings an action against a purchaser for not completing the purchase, *quere*, whether he is bound to prove the execution of the original lease. *Id.*

EXECUTOR.

See COSTS, 1, 4, 9. ECCLESIASTICAL LAW, 1, 2. INSOLVENT, 1. LEGACY, 2. PLEADING, 1.

1. In debt on a judgment recovered by *default* against an executor, the roll of proceedings in the original action showing a return of *nulla bona* by the sheriff to the writ of *fi. fa.* issued to recover the debt *de bonis testatoris*, is sufficient *prima facie* evidence of a *devastavit*. *Leonard v. Simpson*, 251.

2. Where the deceased was a small tradesman, 10*l.* was held to be a reasonable allowance to the executrix for funeral expenses, as against a creditor. *Reeves v. Ward*, 300.

EXECUTION.

See INSOLVENT, 6. INTERPLEADER, 7, 8. PLEADING, 2, 3.

1. Where a warrant of attorney is given for the payment of a sum of money by instalments, with a power reserved to the plaintiff to issue executions from time to time as the payments become due; *semble*, that the body of the defendant may be taken in execution a second time, although he has been discharged under a previous execution. *Atkinson v. Baynton*, 7.

2. Where the plaintiff's attorney levied an execution on the goods of defendant, and afterwards, against good faith, induced the sheriff to make a false return to a writ of *fi. fa.* which showed a larger sum to have been received by the plaintiff than was the fact, the Court ordered the writ to be taken off the file of the court, to be amended. *Green v. Glasbrooke*, 193.

FINE.

1. The consuance of two consursors to a fine was taken in *India*, and the consuance of a third consursor was afterwards taken in this country; the consusee died a few days before the last consuance was taken, and under the circumstances of the case the fine was allowed to pass as to the two consursors in *India*. *Griffith's Fine*, 161.

2. Where a fine was levied by a devisee, by his new name of *Selby*, *Held*, no objection, the lands being properly described. *Vide*, What would be the effect of the fine if levied by a trustee. *Davies v. Lowndes*, 125.

3. The British Consul at a foreign port has authority under 6 G. 4, c. 87, sec. 20, to certify the handwriting and authority of a commissioner who receives the acknowledgment of a married woman. *In re Trustees of Barber*, 318.

4. The acknowledgment of a conveyance made by a married woman in *Ireland*, in pursuance of 3 & 4 W. 4, c. 74, cannot be taken before a commissioner of the *Irish* courts of common law. *In re Anderson*, 418.

FLEET PRISON.

A debtor in the *Fleet* prison was charged with felony by the Lord Mayor's warrant:—*Held*, that the warden was justified, under Reg. Hil. T. 3 G. 2, in placing him in the strong room of the prison for safe custody. *Esparte Angle*, 366.

FOREIGN LAW.

1. By the French law of prescription, relating to bills of exchange, the debt is not extinguished, but the remedy only is taken away. *Huber v. Steiner*, 206.

2. When a personal contract, made in a foreign country, is sought to be enforced, so much of the law as affects the rights and merits of the contract is adopted from the foreign country, and all which affects the remedy is taken from the *lex fori* of the country where the action is brought. *Id.*

FORGERY.—See BILLS OF EXCHANGE, 2.

FRAUDS, STATUTE OF.

The declaration stated, that in consideration that the plaintiffs gave time for payment of a debt to A. and B., and received bills at certain dates for that purpose, the defendant undertook to see the bills paid. *Plea*: that there was no note in writing of the undertaking to satisfy the Statute of Frauds. *Replication*: that there was the following note in writing, addressed to the plaintiffs: "Enclosed I forward you the bills drawn by A. upon and accepted by B., which I

doubt not will meet due honour; but in default thereof, I will see the same paid;" and by innuendoes the bills and parties were averred to be the bills and parties mentioned in the declaration:—*Held*, on demurrer, that no sufficient consideration appeared to support the defendant's undertaking. *Hawes v. Armstrong*, 179.

FRAUDULENT PREFERENCE.

See **BANKRUPT**, 4, 5, 6.

FREIGHT.

See **BANKRUPT**, 7.

By a charter-party, it was agreed that the ship *Jane* should take in a cargo of coals, and proceed to *Buenos Ayres*, and should there re-load such goods as the freighters should cause to be shipped, and proceed to a port between *Gibraltar* and *Antwerp*. The freight for the said voyage out and home 1,300*l.* in full, if delivered at *Gibraltar*; 200*l.* to be paid in *London* on the vessel being dispatched from *Portsmouth*, cash for the necessary expenses of the vessel in the river *Plata*, and the remainder to be paid on the final delivery of the homeward cargo. The vessel reached *Buenos Ayres*, and delivered her cargo, and the 200*l.* was paid in *London* when she sailed. At *Buenos Ayres* she received a cargo of hides, and on her homeward voyage to *Gibraltar* was wrecked at the *Azores*, but a part of the cargo was saved, and the vice-consul, acting on behalf of the owners of the cargo, upon the suggestion of the captain of the *Jane*, forwarded the goods to *Gibraltar* by another vessel:—*Held*, that, under the circumstances, the plaintiff was not entitled to recover the full freight agreed to be paid by the charter-party, but that he was entitled to claim freight *pro rata itineris*, for the conveyance from *Buenos Ayres* to the *Azores*, of that portion of the cargo which was ultimately received at *Gibraltar*. *Mitchell v. Darthez*, 418.

GUARANTEE.

See **FRAUDS**, STATUTE OF.

HUSBAND AND WIFE.—See **PLEADING**, 16.

INCLOSURE.—See **EJECTMENT**, 3.

INFANT.

See **BAIL**, 6.

1. Where an infant rented a house, and exercised his calling therein as a barber, *Held* that it was properly left to the jury to decide, whether it came within the term of necessities: *Scumble* that there is no distinction between a trade car-

ried on by a minor, and his occupation in a manual employment, and that he is not liable for the rent of a house taken for either purpose. *Lowe v. Griffiths*, 30.

2. Where an infant, sixteen years of age, was taken in execution, in an action for slander, and the Insolvent Court, upon petition, held that they had no power to discharge him, this Court will not discharge him out of custody. *Defries v. Davies*, 103.

3. The defendant and an infant covenanted that they, or one of them, would pay a certain annuity:—*Held*, that although the Annuity Act avoided the contract made by the infant, the covenant might be enforced against the defendant. *Gillow v. Sir John Scott Lillie*, 160.

INSOLVENT.

1. The executors of a will, under which A., an insolvent debtor, was entitled to a legacy, gave his assignees a balanced account, wherein they admitted 622*l.* to be the amount of the legacy; but, on the other side, they debited the insolvent with a loan of 400*l.*, advanced on the security of the legacy when it was in reversion; the assignees proved at the trial that the instrument, by which the loan was secured, was void under the Insolvent Act:—*Held*, that they were entitled to recover the whole of the legacy. *Rose v. Savory*, 269.

2. A plaintiff, claiming title as assignee of an insolvent, under the compulsory clauses of the *Lords' Act*, (32 G. 2, c. 28.), need not show that the notices, required by sec. 16, to be given to creditors before the insolvent is brought up, were duly given. Proof of the assignment is sufficient. *Doe d. Milburn v. Edgar*, 431.

3. When the trusts contained in the assignment were more extensive than the trusts authorised by the statute, *Held*, that the assignment was not on that account invalid. *Id.*

4. Land belonging to the insolvent, and contracted to be sold, but not conveyed, will pass to the assignee, under the general words of the assignment, although, in the schedule, the insolvent described his interest in the land as being a debt due from the intended purchaser. *Id.*

5. The general assignee of an insolvent debtor, under 7 G. 4, c. 57, may maintain ejectment to recover copyhold premises, although the assignment of the insolvent's estate to the plaintiff has not been entered on the court rolls of the manor. *Doe dem. Brenan v. Glenfield*, 78.

6. Where goods are seized under a judgment entered up, on a warrant of attorney, before the imprisonment of an insolvent, and are sold by the sheriff after the imprisonment, the execution creditor is liable to an action of trover, at the suit of the insolvent's assignee, to recover the goods. See 7 G. 4, c. 57, sec. 34. *Kelcey v. Minter*, 177.

INSURANCE.

1. By a policy of insurance, certain *hides* were insured from the usual perils, "free of particular average, unless the ship be stranded." In the course of the voyage the *hides* were so much damaged by salt water, that they were necessarily sold, and the ship proceeded on her voyage homewards, and was stranded:—*Held*, that the rights of the assured and underwriters were fixed and determined, at the time of the sale of the hides, and that the subsequent stranding of the vessel did not satisfy the condition upon which the warranty depended. *Rous v. Salvador*, 49.

2. Where, by the terms of the policy, the underwriter was not answerable for any average loss upon certain *hides* insured, and in the course of the voyage the *hides* became so damaged by one of the perils insured against, that they could not have been carried to the place of their destination, (in consequence of their state of putridity,) whereupon the hides were sold at the nearest port:—*Held*, that it amounted to a constructive total loss. *Id.*

3. Where the hides were sold in the state and under the circumstances above mentioned, *Held*, that notice of abandonment was necessary, to enable the assured to maintain an action for a total loss. *Id.*

4. By a policy of insurance, assurance was made "including risk of craft to and from the ship" on linseed oil cakes, "free of particular average, unless general, or the ship was stranded." The cakes were put on board a lighter, to be landed at their destination, and the lighter stranded and sunk, whereby a particular average loss was sustained:—*Held*, that the underwriters were not liable. *Hofman v. Marshall*, 330.

INTERPLEADER.

1. In a joint action of trover against two defendants, one of them, who claimed no title to the goods, was held to be entitled to relief under the Interpleader Act. *Gladstone v. White*, 386.

2. The sheriff is not entitled to his costs, in ordinary cases, under the Interpleader Act, 1 & 2 W. 4, c. 58. *West v. Rotherham*, 461.

3. After the Court of Chancery have issued an injunction to stay a cause, the Court will not grant a rule for interpleading. *Arayne v. Lloyd*, 166.

4. Under particular circumstances, the Court allowed cause to be shown at chambers to a sheriff's rule under the Interpleader Act. *Hailey v. Disney*, 189.

5. Where two parties claim to be entitled to a reward, the defendant, when sued by one of them to recover it, is not entitled to the relief given by the Interpleader Act, 1 & 2 W. 4, c. 58. *Collis v. Lee*, 204.

6. Where the defendant, in an issue tried under the Interpleader Act, died, after verdict for the plaintiff, but before the judgment was signed, the Court will not order the rules of court to be entered *nunc pro tunc*, (1 & 2 W. 4, c. 58, s. 7.) *Lumbirth v. Barrington*, 205.

7. Where an execution creditor appears under the Interpleader Act, and consents with the claimant that the sheriff shall sell the goods, and that their produce shall abide the event of an issue to be tried, but subsequently abandons his claim, the Court will compel him to pay the sheriff the costs of selling the goods. *Dabbs v. Humphrey*, 4.

8. A claimant did not appear to a sheriff's rule under the Interpleader Act; the Court held, that neither the sheriff nor the execution creditor were, under the circumstances, entitled to costs. *Oram v. Sheldon*, 92.

IRELAND.

See FINE, 4.

1. By the *Bristol Dock Act*, 48 G. 3, c. xi., s. 38, certain duties are imposed "on goods, wares, and merchandises, imported from parts beyond the seas, and not brought by inland navigation into the port of *Bristol*:"—*Held*, that goods imported from *Ireland* were brought from parts beyond the seas. *Batterby v. Kirk*, 451.

2. By another branch of the statute, other duties are imposed "on goods, wares, and merchandises, brought coastwise into the said port, of foreign growth or importation, but not of *British* growth or manufacture:"—*Held*, that *Irish* linens imported to *Bristol* from *Dublin*, were not brought coastwise. *Id.*

JUDGMENT.

See PRACTICE, 29. 31, 32.

Where a *testatum fi. fa.* appeared on a judgment roll to be founded on an irregular writ of *fi. fa.*, held, that after the *testatum* writ had been executed, without any application made to set it aside, no objection could be raised upon an action being brought on the judgment. *Leonard v. Simpson*, 251.

JUSTICES' CLERKS.—See ACTION, 1.

LANDLORD AND TENANT.

See EJECTMENT, 1, 2, 4, 5, 6. DISTRESS, 1, 2. PLEADING, 17. EVIDENCE, 3, 4, 6.

1. *Quere*.—Whether a lessor can maintain an action in debt against the assignee of part of the land demised, to recover rent issuing from the whole of it. *Curtis v. Spitty*, 153.

2. In assumpsit for use and occupation, under a plea of non-assumpsit, the defendant may show that he has received a notice to pay rent to a mortgagee of the premises. But if the action be for occupation enjoyed before the notice was received, the defence must be specially pleaded. *Waddilove v. Barnett*, 395.

3. The defendant was tenant to A. of premises of which A. agreed, in writing, to grant a long lease to the plaintiff, subject to certain conditions. The defendant thereupon paid the next quarter's rent to the plaintiff: the agreement was not carried into effect, and A. gave the defendant notice to pay the next quarter's rent to him as before:—*Held*, in an action brought by the plaintiff for the next quarter's use and occupation, that the defendant was not estopped from showing by these facts that all parties were remitted to their original rights. *Brook v. Biggs*, 462.

LEASE.—See LANDLORD AND TENANT, 3.
COVENANT, 1, 2.

LEGACY.

See INSOLVENT, 1.

1. A testatrix, after giving several legacies free of duty, bequeathed a part of her estate to trustees, "upon trust to pay off all and every debt and debts of her first husband that could be legally and satisfactorily proved against him, as it was her will and desire that the same should be discharged:—*Held*, that the creditors were liable to the legacy-duties payable upon this bequest: *Foster v. Ley*, 326.

2. A bill being filed in *Chancery*, to ascertain the debts due from the testatrix's late husband, the parties appeared before the Court, and the amount of the debts was ascertained and paid in full, but the Court neglected to give directions for the payment of the legacy-duties, pursuant to 38 G. 3, c. 52. The duties were subsequently paid by the executors, when the accounts were passed through the Stamp Office:—*Held*, that they could maintain an action to recover the amount of the duties against the legatees, in respect of whose legacies they were paid. *Id.*

LIBEL.

See EVIDENCE, 1, 2.

If a libel is sent to a newspaper, and the editor strikes out the most libellous portions, and publishes the remainder, the writer is liable for the part which is published. *Tarpley v. Blabey*, 414.

LIEN.

See ATTORNEY, 1. CONTRACT, 3. COSTS, 3.

The owners of a scribbling and fulling-mill gave notice, that "all goods on hand were subject to a lien for a general balance:—*Held*, that goods on hand meant the yarn or cloth sent to the mill, and did not extend to articles used in scouring the cloth, or to materials used in dyeing it. *Cumpton v. Haigh*, 373.

LIMITATIONS, STATUTE OF.

See ANNUITY, 2. FOREIGN LAW, 1. EJECTMENT, 2.

1. If goods are supplied by A. to B., and five years afterwards there are mutual dealings between the parties, *Queere*, whether the first item comes within the exception of merchants' accounts in the Statute of Limitations. *Moore v. Strong*, 28.

2. To take a case out of the statute, the acknowledgment of a debt must contain an express or implied promise to pay. *Linsley v. Bonsor*, 305.

3. Where a trustee, appointed under a deed of assignment for the benefit of the creditors of A., paid a sum of money to a creditor, in part-payment of his debts, which payment A. had not authorized him to make, except in satisfaction of the demand:—*Held*, that this was not such a part-payment as would take the case out of the Statute of Limitations. *Id.*

MERCANTILE LAW.—See CONTRACT, 1, 2.
FREIGHT, 1. INSURANCE, 1, 2, 3, 4.

MERCHANTS' ACCOUNTS.

See LIMITATIONS, STATUTE OF, 1.

MISDIRECTION.—See NEW TRIAL, 1, 2.

MONEY HAD AND RECEIVED.

See BANKRUPT, 2, 8. CONTRACT, 1.

MORTGAGE. See LANDLORD AND TENANT, 2.

NEW TRIAL.

See PRACTICE, 30.

1. Where the judge at a trial expressed an unfavourable opinion upon evidence offered for the

plaintiff, and his counsel therefore stopped the summing up, and elected to be nonsuited, *Held*, there being no misdirection, that the plaintiff was not entitled to set aside the nonsuit. *Simpson v. Clayton*, 463.

2. In an action for maliciously, and without probable cause, causing the plaintiff to be charged with a felony: it appeared that the defendant charged the plaintiff, his servant, with stealing a trunk and other articles, on quitting his service; the judge left the question of reasonable and probable cause to the jury:—*Held*, that this was no misdirection, because, in some cases, the reasonable and probable cause, as well as the question of malice, may be left to the jury. *M'Donnell v. Brooke*, 314.

NONSUIT.—See NEW TRIAL, 1.

NUISANCE.—See PLEADING, 5. —

Easement
OUTLAWRY.

In case for proceeding to outlawry against the plaintiff, the declaration stated that the defendant falsely and maliciously, and without probable cause, to procure the plaintiff to be declared an outlaw, made an affidavit of debt for £3,550, and that such proceedings were thereupon had, that the plaintiff, under the pretence of owing the said sum, was declared an outlaw.

It was in evidence, that the plaintiff owed the defendant £3,550, on a mortgage, but that a contract to purchase the mortgaged premises, in liquidation of the debt, had been made by the defendant, but not completed:—*Held*, that upon this evidence the plaintiff was not entitled to recover. *Drummond v. Pigou*, 190.

OVERSEER.—See PLEADING, 11.

PARTNER.

See STAMP.

1. The plaintiff agreed to horse a mail at £9 per mile per annum, and the defendant agreed to pay him the same; and it was further agreed, that all money received for the carriage of parcels should be divided equally between the plaintiff and defendant, and that all losses caused by the loss of parcels should be borne in equal proportions:—*Held*, that this amounted to a partnership, and that no action could be maintained at law to recover the payment of the £9 per mile, or the moiety of the money received for the carriage of parcels. *Green v. Beesley*, 199.

2. Where a ship broker generally employed an insurance broker to effect insurances on vessels, and amongst others on vessels in which the ship

broker was part owner; and the insurance broker charged all the premiums in a running account which he kept with the ship broker, and charged him for the amount, allowing him half commission:—*Held*, that the insurance broker might afterwards, on the bankruptcy of the ship broker, sue the other joint co-owners of his vessels, (who had authorised the insurance,) their names being unknown to the insurance broker when the insurance was effected, and no fraud or laches on his part being proved. *Robinson v. Gladow*, 245.

PLEADING.

See VARIANCE, 1, 2, 3. 6. 8.

1. An executrix pleaded in assumpsit that she had not, nor at the commencement of the action or since, had any goods which were of the testator at the time of his decease in her hands, to be administered; and the plaintiff replied, that the defendant before, and at the time of the commencement of the action, and since, had divers goods of the testator to be administered; upon which issue was joined. At the trial, the plaintiff having shown that the defendant received certain assets, the defendant proved payments to a greater amount, and a verdict was found in her favour:—*Held*, First, that evidence of the payments was properly received; and Secondly, that the plaintiff was not entitled to judgment *non obstante veredicto*, upon the ground that the introductory part of the plea did not state that the executrix had fully administered the testator's goods. Whether such an omission is ground of special demurrer, *Qu. Reeves v. Ward*, 300.

2. Where a party is in execution, and a third person engages that, if he is discharged, he will have him forthcoming at any future period, in case it should appear necessary to the plaintiff to issue another execution, and an action is afterwards brought for the non-performance of such an agreement, the defendant cannot set up the illegality of the first execution as an answer to the action. *Atkinson v. Baynton*, 7.

3. In such an action, if the plaintiff avers generally that the defendant had notice of the issuing of the second execution, the defendant cannot object, on *general demurrer*, that the time and place, when and where he was required to render the party, is not set out in the declaration. *Id.*

4. In trespass, the declaration stated that the defendant broke and entered a "certain close of the plaintiff," and the defendant pleaded that the close was not the plaintiff's close:—*Held*, that the possession, and not the ownership of the close, was in issue. *Heath v. Milward*, 198.

5. In case, for a nuisance to plaintiff's occupation of his dwelling-house, the defendant pleaded that he had possessed his workshops for ten years before plaintiff became possessed of his term in the dwelling-house, and had there car-

ried on his trade without complaint from the occupiers of the plaintiff's house:—*Held*, that the plea should have shown a holding for twenty years. *Elliotson v. Feetham*, 259.

6. A plea of set-off to an action by the assignee of a bankrupt, must show that it is pleaded to a debt to which it is strictly applicable. *Groom v. Mealey*, 212.

7. In a declaration in trespass on the case, the plaintiff stated, by way of inducement, that the defendant, before the committing of the grievance thereafter mentioned, was possessed of a close used as a private road, and then the injury was stated to have been sustained by the defendant digging a sewer in the said close used as a private road, and thereby withdrawing the water from a pond on the plaintiff's close. It was in evidence, that at the time of digging the sewer the defendant's close was not used as a private road:—*Held*, that, under the plea of not guilty, the defendant admitted all matters of inducement:—and *semble*, that the allegation of the uses of defendant's close was surplusage. *Dukes v. Gosling*, 120.

8. In assumpsit, under a plea of *non-assumpsit*, the consideration for the promise is not traversed. *Pusserger v. Brookes*, 123.

9. In assumpsit, by an attorney, to recover his bill of costs, it cannot be objected, under a plea of *non-assumpsit*, that the costs were incurred in preparing and enforcing agreements which had been declared illegal. *Potts v. Sparrow*, 135.

10. There were two counts in the declaration: defendant pleaded a set-off to the first count, and by a separate plea, a set-off to the second count. *Quere*, Whether such a mode of pleading is good. *Gibson v. Bell*, 136.

11. The plaintiff alleged that he had been appointed and was assistant-overseer of the parish of W., and that the defendant published a libel concerning him as such assistant-overseer; the defendant pleaded that the plaintiff had not been appointed, and was not such assistant-overseer:—*Held*, that proof of the appointment of the plaintiff by two justices, and of his having acted in the office, was sufficient evidence to support the allegation in the declaration, and that the plaintiff need not prove his previous nomination and election by the parishioners, as required by 59 G. 3, c. 12, s. 7. *Quere*, Whether the defendant could have raised an issue on the validity of the plaintiff's nomination and election. An averment that the plaintiff had passed his accounts as assistant-overseer, and that he had verified them on oath, was held to be supported by evidence that he had kept the accounts of the parish, and verified them on oath; the accounts being headed "overseers' accounts." *Gaskell, J., dissentiente*. *Vide* 59 G. 3, c. 12, s. 7. *Cannell v. Curtis*, 342.

12. In an action for slander, the declaration alleged that the defendant falsely and maliciously spoke certain words insinuating that the plaintiff

was in embarrassed circumstances, and unfit to be trusted in his business. The plea justified the speaking of the words in a communication made by the defendant to a tradesman, who made inquiries of him in the way of his trade respecting the state of the plaintiff's affairs; and it was also alleged, that the defendant believed the statement to be true:—*Held*, on special demurrer, that the plea was insufficient, because it neither expressly denied malice, nor stated the publication to have been made honestly and *bona fide*, which might have amounted to an implied denial of malice. *Smith v. Thomas*, 353.

13. A plea in bar, which merely denies that the plaintiff has sustained special damage, is bad, where the words are actionable in themselves. —*Id.*

14. A defendant cannot move to enter a verdict *non obstante* where an issue is found against him, which he has himself taken. *Rand v. Vaughan*, 173.

15. A party cannot take advantage of an ambiguity in a traverse, after having taken an issue upon it, and gone to trial. Therefore, where the plea in assumpsit was, that the sum demanded was payable upon the completion of a building to the satisfaction of the defendant or his surveyor, and that it had not been completed to the satisfaction of either; and the plaintiff replied, that it was completed to the satisfaction of both; "without this, that it was not completed to the satisfaction of defendant or his surveyor," and issue thereon:—*Held*, upon proof of completion to the satisfaction of the defendant, and verdict for plaintiff, that no objection could be raised by the defendant after verdict. *Bradley v. Milnes*, 158.

16. The alleged consideration for defendant's promise to pay money to the plaintiff was, the plaintiff's undertaking to execute "a certain deed of separation between him the plaintiff and his wife;" which deed had been already prepared, but was not executed:—*Held*, on demurrer, that as nothing appeared on the pleadings to show that the deed of separation was illegal, the Court would not presume its illegality, and that the consideration was not illegal. A party cannot enforce a contract, where the consideration is illegal, either wholly or in part. *Waite v. Jones*, 166.

17. Tenants in common must sever in an action, on 4 G. 2, c. 28, to recover double value for holding over, if the tenant held the premises by a separate demise from each tenant in common. *Wilkinson v. Hall*, 170.

18. The replication *de injuriâ* is not applicable in assumpsit, when the plea does not admit the promise stated in the declaration, and excuses its non-performance; therefore such a replication was held to be ill, where the declaration was for a breach of contract, in not paying for goods by bills with security; and the plea set out a custom of trade, that such security was only given when it was demanded before the goods were delivered. Whether a replication *de injuriâ* is in any case

applicable in assumpsit, *quere*. *Whittaker v. Mason*, 319.

19. In an action on a bill of exchange, by indorsee against acceptor, a plea, alleging only that the acceptance was obtained by fraud, is bad. *Bramah v. Baker*, 66.

20. In a similar action, to a plea, alleging that the acceptance was obtained by fraud, and that the plaintiff gave no consideration for the bill, it is sufficient for the plaintiff to reply that he did give consideration, without setting out the particulars of the consideration. *Id.*

21. The replication *de injuriâ* is applicable in assumpsit, where the plea contains matter of excuse. *Griffin v. Yates*, 387.

22. The declaration set out a contract "that the defendant agreed to sell his horse to the plaintiff for 200*l.*, provided he trotted eighteen miles within one hour, within one month, and one *Norcliffe* to be the judge of the performance: if the task was not performed, the horse was thereby sold to the plaintiff for 1*s.*—*Held*, that a plea was ill, which stated that *Norcliffe* refused to attend upon request, whereby the horse was prevented from performing the task. *Brogden v. Marriott*, 383.

23. The defendant pleaded, that the horse would have performed the task, but that one A. B., then being the servant of the plaintiff, wrongfully and wilfully, as the servant and agent of the plaintiff, interrupted the trotting of the horse:—*Held*, that a replication which traversed the whole of the plea, was good. *Id.*

24. In an action, on a bill of exchange, evidence of part payment may be given to reduce the damages, although it is not specially pleaded. *Shirley v. Jacobs*, 214.

25. In assumpsit for use and occupation, under a plea of non-assumpsit, the defendant may show that he has received a notice to pay rent to a mortgagee of the premises. But if the action be for occupation enjoyed before the notice was received, then such a defence must be specially pleaded. *Waddilove v. Barnett*, 395.

26. Assumpsit for the copyright of a play. *Plea, non-assumpsit.*—*Held*, that it could not be objected that the assignment was not in writing, but that it ought to have been specially pleaded. *Barnett v. Glossop*, 94.

27. In an action of assumpsit, where defendant pleaded accord and satisfaction, and the plaintiff replied, that the defendant did not pay the sum in satisfaction, nor did the plaintiff receive the said sum in satisfaction:—*Held*, upon demurrer, that the replication was not bad for multifariousness. *Webb v. Weatherby*, 39.

28. Trespass for taking plaintiff's goods. The defendants, by a special plea, stated that one A. became a bankrupt, and the issuing of a commission, and the assignment of effects to the assignees, was then set forth in the usual form. That said goods were the property of the assignees,

but that the plaintiff, claiming title under colour of a certain gift, pretended to have been made thereof by the bankrupt, seized and took the goods, and therefore the defendants, as the servants of the assignees, justified the trespass. *Replication*, that the said goods were not the goods of the assignees, but were plaintiff's goods:—*Held*, that the proceedings under the commission of bankruptcy were admitted by the replication, and that the only point in issue, was the property in the goods. *Jones v. Brown*, 33.

29. In trover for a bill of exchange, defendant pleaded that, before the conversion, A. was lawfully possessed of the bill, and that he indorsed it to B., and that B., for a valuable consideration, indorsed it to the defendant. The replication took issue upon the averment of consideration; which was found for the plaintiff:—*Held*, that by this plea the title of the plaintiff was admitted, and that the defendant was not entitled to arrest the judgment upon the ground that the title appeared to be in A.:—*Held* also, that defendant was not entitled to a replender. *Fancourt v. Bull*, 98.

PRACTICE.

See ARREST. ATTACHMENT. BAIL. EJECTMENT. INTERPLEADER.

I. PROCEEDINGS TO APPEARANCE:

1. The proper indorsement on a writ of *capias* as to the payment of the debt, &c., is "within four days from the service," but a mistake in this respect may be amended on payment of costs. *Lord Puget v. Stockley*, 317.

2. A *distringas* was refused where the writ of summons had been issued more than four months, and without being continued by an *alias* writ. (See 2 W. 4, c. 39, s. 10.) *Sewell v. Brown*, 317.

3. No. 2, *Clifford's Inn Passage, Fleet Street*, in the city of London, is a sufficient indorsement of the attorney's residence on a writ of summons: the parish need not be named, 2 W. 4, c. 39, s. 12. *Arden v. Garry*, 197.

4. A writ of right was sued out on the 28th of December, 1834, but the return-day was altered, from time to time, until the 21st November, 1835, when the writ was enforced:—*Held*, that this was in effect commencing a real action after the time limited by 3 & 4 W. 4, c. 27, s. 36; and the writ having been returned into the *Common Pleas*, that Court set aside the proceedings which were founded on the writ. *Leigh*, demandant, v. *Leigh*, tenant, 411.

5. Before a *distringas* will be granted to compel an appearance, it must be positively sworn that the defendant has not appeared. *Hocker v. Townsend*, 204.

6. The Court of Common Pleas has no authority over a writ of right until it has been returned, and filed in that court, and any applica-

tion to set aside the writ for irregularity must be made to the Court of Chancery. *Foot*, demandant, v. *Sheriff*, tenant, 412.

7. The demandant in a writ of right sued out a writ of summons with a wrong return-day, and after having delivered the issue and deposited the writ with the sheriff, he caused the return to be altered, and the writ to be re-sealed, and notice of the alteration was given to the tenant:—*Held*, that the writ was valid, it not being executed when the alteration was made. *Miller* v. *Miller*, 185.

8. To obtain a *distringas* the copy of the writ of summons must be left at the defendant's supposed address, although the parties residing at the house state that they have no knowledge of him. *Hookes* v. *Tooke*, 315.

II. DECLARATION AND SUBSEQUENT PLEADINGS:

9. Where the master of a ship was served with process in an action on the eve of his departure on a foreign voyage, the Court allowed twelve months' time to plead. *Hunt* v. *Barkley*, 103.

10. If a defendant neglects to pay the debt and costs indorsed on a writ within four days from the service (R. Hil. T. 2 W. 4, II.) the plaintiff may state a further claim in his declaration. *Rouditch* v. *Slaney*, 224.

11. A plaintiff will be allowed time to declare, where, in a joint action, he cannot bring one of the defendants before the Court, in consequence of his absence from this country. *Richardson* v. *Pollen*, 75.

12. Where a judgment was set aside on payment of costs, and an affidavit of merits, with leave to plead *de novo*, the Court refused to allow defendant to plead that the plaintiff, an attorney, had not delivered a signed bill of costs in pursuance of the statute, that not being a plea to the merits. *Becke* v. *Mordant*, 196.

13. The rule that a plaintiff must declare within one year from the return-day of the process, applies to real as well as personal actions. *Barnes* v. *Jackson*, 59.

14. Before the regular time of pleading had expired, the defendant obtained an order for seven days' time to plead, the defendant then being under terms to take short notice of trial at the sittings:—*Held*, that the further time ought to be reckoned from the date of the order, as the cause could not otherwise be tried at the sittings. *Simpson* v. *Cooper*, 448.

15. Where the defendant admitted, in writing, that he owed the money sought to be recovered, but, after action brought, pleaded a defence inconsistent with the admission, apparently for delay, the Court refused to treat the plea as a sham plea. *La Forest* v. *Langan*, 410.

16. A defendant may, notwithstanding the new rules of pleading, plead the general issue,

and another plea apparently inconsistent, if he has reasonable grounds for supposing both are necessary to meet the exigencies of the case. *Hart* v. *Bell*, 6.

17. In an action of trover for wool, a defendant may plead, since Reg. 5, H. T. 4 W. 4, 1st. The general issue; 2d. A lien by custom; 3d. A lien by agreement; 4th. A lien by custom, with a statement that the wool was deposited by one having a *prima facie* title to it; and 5th. A lien by custom, with a statement that the wool was deposited with the defendant by the plaintiff's agent. *Leuckhart* v. *Cooper*, 16.

III. DEMURRER, PRACTICE OF.

18. In a writ of right the tenant may withdraw a demurrer to the demandant's count. *Troynoy* v. *Lowndes*, 196.

19. Where a defendant became bankrupt after a cause was set down for argument on demurrer, the Court refused to strike it out of the paper at the suggestion of the plaintiff, although the assignees refused to give security for costs. *Flight* v. *Glossip*, 222.

20. Where demurrers were raised on the pleadings, subsequent to the declaration, the Court refused to hear an objection as to the illegality of the contract declared upon, no exception being taken on that point in the margin of the demurrer-book. *Brugden* v. *Marriott*, 383.

21. A defendant against whom judgment on demurrer was given, having obtained further evidence, obtained leave from a judge at chambers to make a material amendment in one of the pleas:—*Held*, that the proceeding was irregular, but under the circumstances the Court refused to set aside the order. *Atkinson* v. *Baynton*, 144.

22. The Court will not allow a plaintiff in a penal action to amend his declaration after demurrer, where the amendment would not tend to the furtherance of justice. *Matthews* v. *Swift*, 175.

IV. JUDGMENT AS IN CASE OF A NONSUIT:

23. Where an action is brought for false imprisonment, and the defendant afterwards prefers an indictment against the plaintiff for an assault, which was the offence charged to have been committed when the plaintiff was imprisoned, the Court will not compel the plaintiff to try the cause, until the other proceedings are terminated. *Long* v. *Hutchins*, 56.

24. Where the demandant in a writ of right had neglected to proceed to trial, the Court granted judgment as in case of a nonsuit, leaving the demandant to his remedy by error, if the statute 14 G. 2, c. 17, did not apply to writs of right. *Mason* v. *Sadler*, 358.

25. Where a plaintiff has served a rule to discontinue, and the costs are taxed, but not paid,

the defendant is not entitled to judgment as in case of a nonsuit. *Cooper v. Holloway*, 76.

26. Where a peremptory undertaking to try has been given, and default made, a rule for judgment as in case of nonsuit for non-performance of the undertaking, must be a rule *nisi* only. *Whalley v. Followes*, 77.

V. INCIDENTAL PROCEEDINGS:

27. What documents a party will be required to admit under R. H. T. 4 W. 4. *Smith v. Bird*, 96.

28. Money paid into court in lieu of bail cannot be transferred to the account of a plea of payment. *Ball v. Stafford*, 316.

29. Where a judgment has been satisfied, and the plaintiff is out of the country, so that the usual warrant to enter up satisfaction on the roll cannot be obtained, the defendant must clearly prove that judgment is satisfied before satisfaction can be entered. *De Bastos v. Willmott*, 15.

30. Where a new trial from the Sheriff's Court has been granted at the instance of the plaintiff, who afterwards neglects to re-try the cause, the defendant must take down the record by proviso. *Corone v. Garment*, 74.

31. An application to set aside a judgment and execution for irregularity, will not be granted, with a stay of proceedings, unless notice of the application has been given to plaintiff. *Rolfe v. Brown*, 27.

32. When a judgment is set aside for irregularity on summons, before a judge at chambers, and no order is made as to costs, the Court refused to order the payment of the costs of setting aside the judgment, but discharged a rule obtained for that purpose with costs. *Davy v. Brown*, 22.

33. In the case of a prisoner, and under special circumstances, the Court ordered the prothonotary, in computing principal and interest on a promissory note, to inquire into the consideration for which the note was given, and to decide on the facts as a jury would do. *Fife v. Bruyere*, 317.

34. The notice of disputing the petitioning creditor's debt, the trading, or the act of bankruptcy, as required in certain cases by sec. 90 of the Bankrupt Act, 6 G. 4, c. 16, must be given, although, under the new rules of pleading, the denial of the bankruptcy may appear upon the record. *Moon v. Raphael*, 289.

35. A trial will be put off at the instance of defendant from Easter till after Michaelmas Term, to enable him to obtain the evidence of a material witness. *Grierson v. Aird*, 76.

36. Where an action is brought for a sum above 20*l*., and the plaintiff subsequently reduces his claim to a sum less than 20*l*., a judge has no power to send the issue for trial to the

Sheriff's Court, under stat. 3 & 4 W. 4, c. 42, s. 27. *Trotter v. Bass*, 23.

37. If a rule is obtained against an attorney, it must appear upon the affidavit that he is an attorney of the court. *Esparte Lord*, 195.

38. The Rules of Hil. T., 4 W. 4, apply only to actions over which the courts of common law have a concurrent jurisdiction, and therefore they do not extend to real actions. *Miller v. Miller*, 31.

39. An attorney's clerk corrected the date of the jurat of an affidavit after it had been sworn, and the Court set aside the proceedings to which it referred. *Finnerty v. Smith*, 158.

40. The word "peremptory" was put upon a summons to attend at chambers, without the authority of the judge, and the Court inflicted the payment of costs upon the attorney. *Id.*

PRINCIPAL AND AGENT.

See PARTNER, 2. STOPPAGE IN TRANSITU.

PROBATE.—See ECCLESIASTICAL LAW, 1, 2.

PROMISSORY NOTE.—See BILLS OF EXCHANGE.

REAL ACTION.—See PRACTICE.
4. 6. 7. 13. 18. 24. 38.

RENT.—See DISTRESS, 1, 2.—PLEADING, 17.
25.

REPLEVIN.

See COSTS, 2. 6.

1. In an action against the sheriff for taking insufficient pledges, in *replevin*, he is liable to the amount of the penalty in the bond, viz., double the value of the goods distrained. *Paul v. Goodluck*, 370.

RULES OF COURT,

Upon which decisions are reported.

Hil. T. 3 G. 2. (Fleet Prison.)

Esparte Angle, 366.

Trin. T. 1 W. 4 (Bail.)

Boyd's Bail, 93.

Hil. T. 2 W. 4.

Boyd's Bail, 93.

Barnes v. Jackson, 59.

Hil. T. 2 W. 4. (*continued.*)

Bowditch v. Slaney, 224.
Brogden v. Marriott, 383.
Lord Paget v. Stockley, 317.
Daubuz v. Rickman, 75.
George v. Flston, 63.
Grant v. Gibbs, 56.
Watson v. Muskall, 73.
Sharpe v. Johnston, 298.

Hil. T. 4 W. 4. (*Practice.*)

Leuckart v. Cooper, 16.
Miller v. Miller, 31.
Smith v. Bird, 96.

— (Pleading.)

Barnett v. Glossop, 94. (Assumpsit.)
Dukes v. Gostling, 120. (Case.)
Heath v. Milward, 198. (Trespas.)
Jones v. Brown, 33. (Trespas.)
Passenger v. Brookes, 123. (Assumpsit.)
Potts v. Sparrow, 135. (Assumpsit.)
Shirley v. Jacobs, 214. (Assumpsit.)
Waddilove v. Barnett, 395. (Assumpsit.)

SET-OFF.—See PLEADING, 6. 10.
 BANKRUPT, 1.

SHERIFF.

See EVIDENCE, 13. EXECUTION, 2. INTER-
 PLEADER, 2. 4. 7, 8. REPLEVIN.

A sheriff's officer is liable to the penalty for taking a greater sum on an arrest than is by law allowed, (see 32 G. 2, c. 28.) when he receives more than the caption fee allowed on taxation of costs between party and party. *Innes v. Levy*, 195.

SLANDER.

See PLEADING, 11, 12, 13. EVIDENCE, 7.

1. The plaintiff brought an action for slander, and the words spoken were, "Who stole the parish bell-ropes?" Innuendo, that the plaintiff, whilst churchwarden, had stolen the parish bell-ropes:—*Held*, that the churchwarden had the possession of the bell-ropes belonging to the church, and that he could not be guilty of stealing them, and therefore no action would lie for the words spoken, as they did not impute an indictable offence. *Jackson v. Adams*, 339.

2. The words so laid in the declaration, were held not to be proved by evidence of a conversation in which the defendant charged the plaintiff with fraudulently selling the ropes for a smaller sum than he had given for them. *Id.*

STAMP:

See BILLS OF EXCHANGE, 1. LEGACY, 1, 2.

The following agreement held to be relating to the sale of "goods, wares, or merchandize,"

within the exception in the Stamp Act, 55 G. 3, c. 184, and therefore admissible without a stamp to show a partnership between A. and B. "Memorandum of agreement between A. and B, which is, the horse to be 34l., B. to have half at 17l, and to pay half of the horse's expenses, being with C. At the same time agreed for the horse to go to Newcastle, to be entered for the handicap and silver cup." *Mason v. Short*, 260.

STATUTE, CONSTRUCTION OF.—See
ACTION, 2, 3. IRELAND.

STATUTES,

Upon which decisions are reported.

13 Edw. 1, c. 37. (Bailiffs.)

Begbie v. Hayne, 266.

32 H. 8, c. 34. (Covenant.)

Whitton v. Peacock, 376.

21 Jac. 1, c. 16. (Limitations.)

Linley v. Bonsor, 305.

Moore v. Strong, 28.

— c. 19, (Bankrupt.)

Leisle v. Guthrie, 83.

29 Car. 2, c. 3. (Frauds.)

Haues v. Armstrong, 179.

2 Geo. 2, c. 23. (Attorney.)

Exparte Swift, 175.

Matthews v. Swift, 175.

Exparte Bowles, 143.

4 Geo. 2, c. 28. (Landlord and Tenant.)

Doe d. Pugh v. Roe, 6.

Wilkinson v. Hall, 170.

11 Geo. 2, c. 19. (Landlord and Tenant.)

Rund v. Vaughan, 173.

14 Geo. 2, c. 17. (Nonsuit.)

Corone v. Garment, 74.

Cooper v. Holloway, 76.

Mason v. Sadler, 358.

Whalley v. Fallowes, 77.

32 G. 2, c. 28. (Insolvent. Arrest.)

Doe d. Milburn v. Edgar, 431.

Innes v. Levy, 195.

STATUTES—(continued.)

36 G. 3, c. 52. (Legacy Duty.)

Foster v. Ley, 326.

43 G. 3, c. 46. (Arrest. Costa.)

Bradley v. Milnes, 118.

48 G. 3, c. xi. (Bristol Dock Act.)

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53 Geo. 3, c. 141. (Annuity.)

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55 G. 3, c. 184. (Stamp.)

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57 G. 3, c. 37. (Crown Lands.)

Doe d. Watt v. Morris, 215.

59 G. 3, c. 12. (Overseers.)

Cannell v. Curtis, 342.

9 G. 4, c. 16. (Bankrupt.)

Abbot v. Burbage, 448.
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6 G. 4, c. 87. (Consul.)

Trustees of Barber, 318.

7 G. 4, c. 57. (Insolvent.)

Doe d. Brenan v. Glenfield, 78.
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7 & 8 G. 4, c. 71. (Arrest.)

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9 Geo. 4, c. 14. (Limitations.)

Linley v. Bonsor, 305.

10 Geo. 4, c. 44. (Police.)

Humphrey v. Woodhouse, 64.

11 G. 4, & 1 W. 4, c. 68. (Carriers.)

Boyce v. Chapman, 338.

1 W. 4, c. 22. (Interrogatories' Act.)

Bourdieu v. Rowe, 93.
Brydges v. Fisher, 36.

1 & 2 W. 4, c. 58. (Interpleader.)

Arayne v. Lloyd, 166.
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Gladstone v. White, 386.
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2 W. 4, c. 39. (Uniformity of Process.)

Arden v. Garry, 197.
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3 & 4 W. 4, c. 27. (Real Property Limitation.)

Foot, dem., v. Sheriff, ten., 412.
James v. Saller, 405.
Leigh, dem., v. Leigh, ten., 411.

———, c. 42. (Law Amendment Act.)

Humphrey v. Woodhouse, 64.
Eugler v. Twysden, 393.
Sharpe v. Johnston, 298.
Southgate v. Crowley, 1.
Trotter v. Buss, 23.

———, c. 74. (Fine and Recovery Act.)

In re Anderson, 418.
Griffith's Fine, 161.

STOPPAGE IN TRANSITU.

A., residing in *Guernsey*, employed the defendant as his agent at *Southampton*, to ship all goods which arrived there directed to A. The defendant paid the carriage and the wharfage dues, and selected the ship by which he forwarded the goods:—*Held*, that the transit of the goods was not ended at *Southampton*, and that the vendor might stop them after they had been put on board a vessel for *Guernsey*. *Nicholls v. Le Feuvre*, 255.

TENANTS IN COMMON.—See PLEADING, 17.

TITHES.

The owner in fee of lands, who had purchased the tithes issuing thereout, of the lay impropriator, by deed conveyed the lands in fee, "together with all ways, easements, profits, emoluments, *hereditaments*, and appurtenances, whatsoever, to the same premises belonging or appertaining, and all the estate, right, title, interest, freehold, inheritance, possibility, property, claim, and demand, of him the said W. G., (the grantor.) therein or thereto:—"—*Held*, that tithes did not pass by this conveyance. *Chapman v. Galcombe*, 401.

TRESPASS.—See PLEADING, 1. 7. 28.

TROVER.

See BANKRUPT, 3. EVIDENCE, 8. INTERPLEADER, 1. PLEADING, 29.

1. After the death of an insolvent, certain wine warrants, which had not been delivered to his assignee, were demanded of his widow and administratrix, who said that they were in the possession of her attorney:—*Held*, not sufficient evidence of a conversion to sustain trover to recover the warrants. *Canot v. Hughes*, 410.

2. Where a servant received a bill of exchange from A., making a promise that his master should discount it, which he then delivered to his master, who kept the bill as a security for money due from A., and refused to discount it:—*Held*, that the servant was liable to an action of trover for the recovery of the bill. *Cranch v. White*, 61.

TRUSTEES.

See DEVISE, 4, 8.

1. A testator devised his freehold estates to trustees upon trust, as to three undivided fourth parts, "to pay to or permit and suffer" his wife and daughters to receive "the clear yearly rents and profits," and as to the other undivided fourth part, "to pay to or permit and suffer" his son to receive "the clear yearly rents and profits." He further directed that the shares of his wife and daughters should be for their sole and separate use; and that the trustees should let the estates upon certain conditions, and out of the rents should pay all taxes, and for repairs:—*Held*, that the legal estate in the whole of the premises vested in the trustees. *White v. Parker*, 112.

2. The above devise was to two trustees, "their heirs and assigns," and the testator directed that, upon the death, incapacity, or refusal, to act of any trustee or trustees, a new trustee or trustees should be appointed. One of the trustees died, and the survivor, by deed of lease and release and appointment, to which all the *cestui que trusts* were parties, renounced the trust, and conveyed the premises to one new trustee, who acted in the execution of the trusts:—*Held*, that notwithstanding the intention of the testator that two trustees should always be in existence, and notwithstanding the power of appointing new trustees was not strictly pursued, the legal estate in the premises vested in the trustee so appointed, and that he was therefore liable to be sued in covenant as assignee of the reversion in certain premises belonging to the testator. *Id.*

VARIANCE.

See SLANDER, 1, 2.

1. It was enacted, by a statute made for the purpose of enabling a company to build a market, that it should be lawful for the company to build on part of a certain thoroughfare, provided another avenue was made on an adjacent spot; the company, for the purpose of carrying on their building, put up a barrier, which stopped the thoroughfare, and continued it for an unreasonable time:—*Held*, in an action for so stopping the thoroughfare, that the plaintiff need not complain that the company had stopped the old way and neglected to open the new one, but that it was sufficient to state in the declaration, that the old way was stopped for an unreasonable time. *Gaselee, J., dissentiente. Wilkes v. Humberford Market Co.*, 281.

2. The plaintiff claimed a right to use a navigation, in respect of his occupation of a close abutting on the stream. It appeared that this close had formed a part of the *King's Head* inn, until five years before the action was brought, when it was detached, and all the acts of the user of the navigation which were proved, were exercised by the occupiers of the *King's Head* inn, before the property was divided:—*Held*, that there was no evidence to support the plaintiff's right to a verdict, as on such evidence a grant could only be presumed to the occupiers of the inn. *Bower v. Hill*, 334.

3. Defendant pleaded to an action brought on a promissory note, that a certain agreement was made between him and one A. for the settlement of gambling debts, and that the note was given for securing the payment of such balance, and was consequently void under the statute. The proof was that the note was substituted for a bill of exchange, which was originally given to secure the balance of the gambling debts:—*Held*, that the plea was not supported by the evidence, and that the substituted as well as the original agreement, should have been stated in the plea. *Boulton v. Coghlan*, 145.

4. The plaintiff alleged that he had been appointed, and was assistant overseer of the parish of W., and that the defendant published a libel concerning him as such assistant overseer; the defendant pleaded that the plaintiff had not been appointed, and was not such assistant overseer:—*Held*, that proof of the appointment of the plaintiff by two justices, and of his having acted in the office, was sufficient evidence to support the allegation in the declaration, and that the plaintiff need not prove his previous nomination and election by the parishioners, as required by 59 G. 3, c. 12, s. 7. *Cannell v. Curtis*, 342.

Quere. Whether the defendant could have raised an issue on the validity of the plaintiff's nomination and election. *Cannell v. Curtis*, 342.

5. An averment that the plaintiff had passed his accounts as assistant overseer, and that he had verified them on oath, was held to be supported by evidence that he had kept the accounts of the parish and verified them on oath; the accounts being headed "overseers' accounts." — *Guselee, J., dissentiente.* *Vide* 59 G. 3, c. 12. a. 7. *Id.*

6. In debt for rent on a lease, by lessor against the assignee of the lessee, the declaration stated that all the estate, &c. of the lessee came to and vested in the defendant, which allegation the defendant traversed, and the plaintiffs joined issue. It was in evidence that defendant was assignee of only a part of the demised premises:—*Held*, that there was a fatal variance, and that the issue must be found for the defendant. *Curtis v. Spitty*, 153.

7. In a declaration in trespass on the case, the plaintiff stated by way of inducement, that the defendant before the committing of the grievance thereafter mentioned, was possessed of a close used as a private road, and then the injury was stated to have been sustained by the defendant digging a sewer in the said close used as a private road, and thereby withdrawing the water from a pond on the plaintiff's close. It was in evidence that at the time of digging the sewer the defendant's close was not used as a private road:—*Held*, that under the plea of not guilty, the defendant admitted all matters of inducement:—and *semble*, that the allegation of the uses of defendant's close was surplusage. *Dukes v. Gostling*, 120.

8. The wrongful act complained of was the digging and continuing the sewer, and thereby diverting the water from the pond. The evidence was, that the water was not diverted by digging the sewer, but previously, for the purpose of making the sewer, and it appeared that since the sewer had been made, the water in the pond could not rise to its former height:—*Held*, that there was no variance between the declaration and the proof, so far as it related to the continuing of the sewer. *Id.*

VENDOR AND VENDEE.

See CONTRACT.

1. In an action for damages brought by vendee against vendor, for not making a good title to an estate:—*Held*, that he is not entitled to recover for expenses incurred in negotiating the purchase, or for having the estate surveyed. *Hodges v. Earl of Litchfield*, 40.

2. That he is entitled to recover charges incurred in investigating the title, including the searching for judgments, but not the costs of drawing and ingrossing a conveyance of the estate, the same having been prematurely prepared. *Id.*

3. That the vendor having filed a bill in equity, against the vendee, for a specific performance of the contract, which was dismissed with costs, which were accordingly taxed and paid to the vendee by the vendor:—*Held*, that in the action for damages, the vendee could not recover his extra costs, beyond the taxed costs, which were incurred by him in defending the suit in equity. *Id.*

4. That the vendee could not recover costs incurred by him in investigating the title to the estate, after the filing the bill in equity. *Id.*

5. That the vendee is entitled to be paid at the rate of five per cent. for interest on his deposit-money, although the Court of Chancery had ordered payment at the rate of four per cent. *Id.*

WAGER.—See PLEADING, 22.

WARRANT OF ATTORNEY.

See EXECUTION, 1. INSOLVENT, 6.

WASTES.—See EJECTMENT, 7. EVIDENCE, 3, 4.

WAY.—See ACTION, 3, 4.

WILL.—See DEVISE.

WITNESS.—See ATTACHMENT, 2. EVIDENCE, 9, 10.

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